

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

MAR 23 2018

Edward W. Miller, Circuit Court Judge

S.C. SUPREME COURT

Opinion No. 2018-UP-011 (S.C. Ct. App. Filed January 10, 2018)

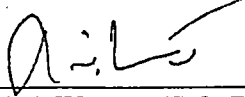
Charles Thomas Hobbs and Mary Hobbs, ... Petitioners,

vs.

Fairway Oaks Homeowners Association, ... Respondents,

APPENDIX

1. Record on Appeal (1-196)
2. Supplemental Record on Appeal (197-204)
3. Appellant's Final Initial Brief (205-229)
4. Respondent's Final Brief (230-260)
5. Appellant's Final Reply Brief (261-279)
6. Order of Court of Appeals (280-283)
7. Petition for Rehearing (284-289)
8. Denial of Petition for rehearing (290)



Raymond T. Wooten (S.C. Bar No. 81483)

SMITH, JORDAN & LAVERY, P.A.

1810 East Main Street

Post Office Box 1207

Easley, South Carolina 29641-1207

(864) 855-1661 office

(864) 855-1685 fax

Wooten@SmithJordan.com

Attorney for Appellants

Easley, South Carolina

March 22, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Opinion No. 2018-UP-011 (S.C. Ct. App. Filed January 10, 2018)

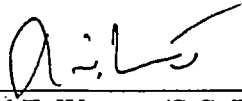
Charles Thomas Hobbs and Mary Hobbs, ... Petitioners,

vs.

Fairway Oaks Homeowners Association, ... Respondents,

APPENDIX

1. Record on Appeal (1-196)
2. Supplemental Record on Appeal (197-204)
3. Appellant's Final Initial Brief (205-229)
4. Respondent's Final Brief (230-260)
5. Appellant's Final Reply Brief (261-279)
6. Order of Court of Appeals (280-283)
7. Petition for Rehearing (284-289)
8. Denial of Petition for rehearing (290)



Raymond T. Wooten (S.C. Bar No. 81483)

SMITH, JORDAN & LAVERY, P.A.

1810 East Main Street

Post Office Box 1207

Easley, South Carolina 29641-1207

(864) 855-1661 office

(864) 855-1685 fax

Wooten@SmithJordan.com

Attorney for Appellants

Easley, South Carolina

March 22, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No.: 2014-CP-39-00613

Charles Thomas Hobbs and Mary
Hobbs,

Appellants,

v.

Fairway Oaks Homeowners
Association,

Respondent.

RECORD ON APPEAL

ATTORNEY FOR APPELLANT:

Raymond T. Wooten
(S.C. Bar # 81483)
Smith, Jordan & Lavery, P.A.
P.O. Box 1207
Easley, SC 29641
(864) 855-1661
wooten@smithjordan.com

ATTORNEYS FOR RESPONDENT:

J.R. Murphy and Wesley B. Sawyer
Murphy and Grantland
P.O. Box 6648
Columbia, SC 29260
(803)454-1237

INDEX

Order Granting Summary Judgment.....	3
Order Denying (Appellants') Notice of Motion and Motion to Alter or Amend Judgment Pursuant to Rule 59, SCRCF.....	8
Summons.....	10
Complaint.....	11
Answer of Fairway Oaks Homeowners Association.....	16
Motion for Summary Judgment of Defendant (Respondent) Fairway Oaks Homeowners Association	21
Memorandum in Support of Defendant's Motion for Summary Judgment with exhibits.....	23
a. Excerpts from Deposition of Tommy Hobbs (Exhibit A).....	30
b. Excerpts from Deposition of Benny Roper (Exhibit B).....	43
c. Excerpts from Deposition of Lee Lambright (Exhibit C).....	52
d. Excerpts from Deposition of David Lapping (Exhibit D).....	71
Memorandum in Opposition to Defendant's Motion for Summary Judgment with exhibits.....	78
a. Excerpts from Deposition of Tommy Hobbs (Exhibit A).....	89
b. Covenants and Restrictions, Article VI, Section 12, pg. 18 (Exhibit B).....	91
c. Bylaws, Article XI, Section 4, pg. 6 (Exhibit C).....	92
d. Excerpts from Deposition of Lee Lambright (Exhibit D).....	93
e. Excerpts from Deposition of Benny Roper (Exhibit E).....	107
f. Excerpts from Deposition of David Lapping (Exhibit F).....	108

Plaintiffs' (Appellants') Notice of Motion and Motion to Alter or Amend Judgment Pursuant to Rule 59, SCRCF.....	109
Memorandum in Opposition to Plaintiffs' Motion to Alter or Amend Judgment Pursuant to Rule 58, SCRCF.....	125
Transcript of Record from August 7, 2015 hearing on Motion for Summary Judgment.....	137
Transcript of Deposition of Charles Thomas Hobbs on November 14, 2014	
a. Direct Examination by John M. Grantland.....	158-170
Transcript of Deposition of Lee Lambricht on November 19, 2014, including all exhibits	
a. Direct Examination by Elliott B. Daniels.....	171-182
b. Cross-Examination by Raymond T. Wooten.....	183-184
c. Defendant's Exhibit 1, Photograph.....	185
Transcript of Deposition of David Lappin on November 19, 2014	
a. Direct Examination by Elliott B. Daniels	186-188
Transcript of Deposition of Benny Roper on November 19, 2014	
a. Direct Examination by Elliott B. Daniels.....	189-192
Declaration of Covenants & Restrictions for Fairway Oaks Homeowners Association pg.18.....	193
By-Laws Fairway Oaks Townhouses Homeowners' Association pg. 6.....	194
Certificate of Counsel	195

STATE OF SOUTH CAROLINA
2015 SEP 23 AM 9 28
COUNTY OF PICKENS
CLERK OF COURT
IN THE COURT OF COMMON PLEAS
PICKENS COUNTY
SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE
CASE NO: 2014CP3900613

Charles Thomas Hobbs vs. Fairway Oaks Homeowners Association

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy: ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the Court:

Order Granting Summary Judgment from Judge Miller

Court Reporter:

PRESIDING JUDGE -

A copy mailed first class this 23rd day of September, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Raymond T Wooten P.O. Box 1207 Easley, SC 29641

John Martin Grantland PO Box 6648 Columbia, SC 29260

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

s/ *Harold P. Welborn Jr*
Harold P Welborn, Jr. - Clerk of Court

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF PICKENS

CIVIL ACTION NO: 2014-CP-39-00613

Charles Thomas Hobbs and Mary Hobbs,

Plaintiff,

vs.

Fairway Oaks Homeowners Association,

Defendant,

**ORDER GRANTING SUMMARY
JUDGMENT**

This matter came before the Court on August 7, 2015 pursuant to a Motion for Summary Judgement filed by Defendant Fairway Oaks Homeowners Association. Elliott B. Daniels was present for the Defendant Fairway Oaks Homeowners Association and Raymond T. Wooten was present for the Plaintiffs Charles Thomas Hobbs and Mary Hobbs.

2015 SEP 23 AM 9 28
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

FINDING OF FACTS

On August 21, 2012, Plaintiff Charles Thomas Hobbs was injured on Fairway Oaks Homeowners Association, (hereinafter "HOA" or "Defendant") common area grounds in Easley, S.C. when a tree limb being removed by an independent contractor fell and struck Plaintiff Charles Thomas Hobbs on the head.

Plaintiff is a longtime resident of Fairway Oaks, and in the five years before his injury, Plaintiff Charles Thomas Hobbs served as President of the HOA. The HOA had a duty to maintain its common areas, and as President of the HOA, Plaintiff Charles Thomas Hobbs arranged for the maintenance and repairs of Fairway Oaks' common areas.

In August, 2012 a resident called Plaintiff Charles Thomas Hobbs to request the removal of a tree limb hanging over his unit. Testimony from the resident indicates Plaintiff Charles Thomas Hobbs advised he would hire a professional tree service based out of Liberty, S.C. on behalf of the HOA to remove the limb. Instead, during a golf outing, Plaintiff asked a personal friend and local handyman, Lee Lambright, to remove the limb. Although Plaintiff Charles Thomas Hobbs hired Lambright for odd jobs at Fairway Oaks over the years, Lambright was not a licensed contractor, and he had no training in

#1
M1

tree limb removal. Lambright agreed to remove the limb if Plaintiff Charles Thomas Hobbs would help, and Plaintiff agreed. Plaintiff Charles Thomas Hobbs hired Lambright because Lambright was less expensive than a professional tree service.

On August 21, 2012, Plaintiff Charles Thomas Hobbs and Lambright met at Fairway Oaks, where Plaintiff helped remove the ladder from Lambright's truck and set it up against the tree. With Plaintiff Charles Thomas Hobbs holding the bottom of the ladder, Lambright climbed up and began to remove branches. While there is conflicting testimony as to where Plaintiff was standing and what he was doing, it is undisputed that he remained under or near the tree as Lambright was cutting limbs from the tree with a chainsaw. Plaintiff chose to be present and chose to stand in that particular location under the tree. A limb that Lambright cut fell and struck Plaintiff Charles Thomas Hobbs.

On May 14, 2014, Plaintiffs filed suit against Fairway Oaks HOA. Relevant discovery is complete, and there are no material facts relevant to this motion in dispute. Defendant moved for summary judgment on December 29, 2014, requesting the Court to find as a matter of law that the HOA is not liable for the negligence of the independent contractor.

STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Flemming v. Rose*, 350 S.C. 488 (2002); *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271 (Ct. App. 2002). Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC.

ANALYSIS

Defendant is not liable for the negligence of an independent contractor that Plaintiff, as the president of the HOA, hired, and no recognized exception to the general independent contractor rule applies. Accordingly, Defendant is entitled to judgment as a matter of law.

I. Defendant is not liable for the negligence of independent contractor Lee Lambright.

Generally, under South Carolina law, a principal that hires an independent contractor is not liable for the negligence of that independent contractor, or for harm caused by that negligence. *Cherry v. Myers Timber Co., Inc.*, 404 S.C. 596, 745 S.E.2d 405 (Ct. App. 2013) (holding that timber company was not responsible for torts of logger hired to harvest and haul timber to mills because the logger was an independent contractor); See 18 S.C. Jur. Negligence § 35.

Here, it is undisputed that Lambright was an independent contractor, and that Lambright was negligent. Indeed, Lambright himself admitted to several mistakes that were made in his work. Nonetheless, the general rule applies: Defendant is not liable for the negligence of Lambright because Lambright was an independent contractor. On the other hand, there are no facts which indicate the Defendant HOA was negligent in causing Plaintiff's injury. The general independent contractor rule applies here: "an employer is not liable for the torts of an independent contractor." *Cherry v. Myers Timber Co., Inc.*, 404 S.C. 596, 745 S.E.2d 405 (Ct. App. 2013). Because Lambright is an independent contractor, Defendant is not liable for Lambright's negligence.

II. There are no exceptions to take this case out of the general independent contractor body of law, and the landlord-tenant exception does not apply.

While the general rule is clear – in South Carolina, a principal is not responsible for the negligence of an independent contractor – a few, particularized exceptions have been recognized under the nondelegable duty doctrine. However, no recognized exception applies here.

Plaintiffs raised the landlord-tenant exception, which has only been applied hereto in the landlord-tenant context: "a landlord who undertakes repair of his property by use of a contractor has a nondelegable duty to see that the repairs done properly, and remains vicariously liable for injuries caused by improper repairs." *Simmons v. Tuomey Reg'l Med. Ctr.*, 341 S.C. 32, 43, 533 S.E.2d 312, 318 (2000), citing *Comier v. Farmers and Merchants Bank*, 243 S.C. 132, 139–40, 132 S.E.2d 385, 388–89 (1963); *Durkin v. Hansen*, 313 S.C. 343, 437 S.E.2d 550 (Ct.App.1993). However, the landlord-tenant

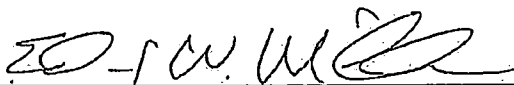
exception does not apply: Defendant is not a landlord and Plaintiff is not a tenant. Rather, Defendant is an HOA, and Plaintiff was its President. This case has no nexus to a landlord-tenant relationship, and this case does not involve a landlord who undertakes repairs. Plaintiff offers no statutory support or applicable case law that imputes the duties and obligations of a landlord onto an HOA.

Plaintiff also argued that the present case is analogous to other situations in which a principal was found to have a nondelegable duty so that they were liable for the actions of an independent contractor. However, there is no recognized exception in South Carolina that removes this case from the general independent contractor rule. To find otherwise would require this court to expand the existing body of case law. Because there is no recognized exception to the general independent contractor rule, Defendant is entitled to judgment as a matter of law.

CONCLUSION

Defendant is not liable for the negligence of an independent contractor that Plaintiff, as president of the HOA, hired, and there is no recognized exception that removes this case from the general independent contractor body of law. The landlord-tenant exception does not apply because Defendant is not a landlord, and Plaintiff is not a tenant. After hearing the arguments of counsel and reviewing the testimony of the witnesses and parties in this case, the Court finds that there is no genuine issue of material fact, and the Defendant is entitled to judgment as a matter of law. The Defendant's Motion for Summary Judgment is accordingly granted.

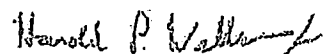
It is **ORDERED, ADJUGED and DECREED** that the Defendant's Motion for Summary Judgment is hereby **GRANTED. IT IS SO ORDERED.**


The Honorable Edward W. Miller
Circuit Court Judge for the Thirteenth Judicial Circuit

Pickens, South Carolina

Date: 8/15/15

Certified Copy



Clerk of Court

Pickens County, SC

Dated Sept 2015

Page 8
MB

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP3900613
2015 NOV 17 PM 1:33

Charles Thomas Hobbs
and Mary Hobbs

Fairway Oaks
Homeowners Association
CLERK'S COURT
PICKENS COUNTY
SOUTH CAROLINA

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☒ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☒ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2130
Judge Code

11/17/2015
Date

For Clerk of Court Office Use Only

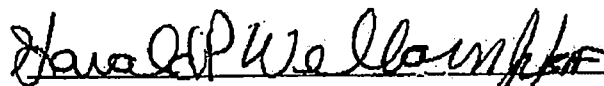
This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

**Raymond T. Wooten, Smith, Jordan & Lavery, 1810 E. Main
St., P.O. Box 1207, Easley, SC 29641**

ATTORNEY(S) FOR THE PLAINTIFF(S)

**John M. Grantland, Murphy & Grantland, P.O. Box 6648,
Columbia, SC 29260
Elliot B. Daniels, Murphy & Grantland, P.O. Box 6648,
Columbia, SC 29620**

ATTORNEY(S) FOR THE DEFENDANT(S)



**Harold P. Welborn, Jr.- Pickens County Clerk of
Court**

Court Reporter

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

**The Plaintiff's Motion to Alter or Amend the Order Granting Defendant's Motion
for Summary Judgment, filed on October 7, 2015, is hereby denied.**

STATE OF SOUTH CAROLINA SOUTH CAROLINA THE COURT OF COMMON PLEAS
COUNTY OF PICKENS 2014 MAY 19 P 1:39 C/A No.: 2014-CP-39-1013

Defendant.

Page 11

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
COUNTY OF PICKENS) 2014 MAY 19 P 1:39 C/A No.: 2014-CP-39- 613
Charles Thomas Hobbs and Mary Hobbs,)
Plaintiffs,)
vs.) **COMPLAINT**
Fairway Oaks Homeowners Association,) **(Jury Trial Demanded)**
Defendant.)
_____)

Plaintiffs, complaining of the Defendant herein, would respectfully show unto this Honorable Court that:

1. Plaintiffs are citizens and residents of Pickens County, South Carolina.
2. Plaintiffs are husband and wife.
3. Defendant is a non-profit corporation organized and existing under the laws of the State of South Carolina, and conducting business in Pickens County, South Carolina. All references to this Defendant include the acts and omissions of its agents, servants and duly elected officials.
4. Jurisdiction and Venue are proper in this Court.
5. At all times relevant hereto, Defendant owned, controlled and maintained the common areas of Fairway Oaks Townhouses ("Development") as shown on a plat prepared by Robert E. Ellis, Jr., dated July 18, 1984 and recorded in Plat Book 26 at page 634 in the Pickens County Register of Deeds.
6. At all times relevant hereto, Plaintiffs owned property located in, and resided in the

Development.

7. On or about August 21, 2012, Plaintiff Charles Thomas Hobbs ("Tommy") was standing in the common area of the Development when he was struck in the head, neck and upper body by a tree branch falling from a tree located in the common area.
8. Prior to August 21, 2012, Defendant received a request that a damaged limb be removed.
9. Pursuant to Article VI, Section 12 of the Declaration of Covenants and Restrictions for Fairway Oaks Townhouses, Easley, South Carolina and Provisions for Fairway Oaks Homeowners' Association, Defendant was obligated to maintain the common areas of the Development.
10. Defendant undertook to repair/remedy the situation by having the limb removed.
11. The Association hired Lee Lambright ("Lambright") to cut the tree limb.
12. Lambright did in fact cut said tree limb which then struck Tommy as described above.
13. At all times pertinent hereto Lambright was acting on behalf of Defendant.
14. Lambright was either employed by Defendant or acting as its agent, or was performing a non-delegable duty of Defendant.
15. Upon information and belief, tree cutting is an inherently dangerous activity.
16. At all times described herein, Defendant was responsible and liable for the actions of Lambright.
17. There were no signs or other warnings that it was dangerous to be in the common area of the Development.
18. There were no fences, ropes or other barricades to prevent people from coming near the area where the tree cutting was being performed.

19. Defendant, and its agents and/or those for whom it is liable for their actions, had a duty to take precautions to keep people safe during the tree cutting, to conduct the tree cutting in such a way that people would not be put in danger from falling limbs, to warn people of the danger posed by said tree cutting and to keep people away from the area where tree cutting was occurring.

20. As a result of being struck by the tree limb, Tommy suffered injuries, all of which have and will in the future cause him to undergo much physical pain and suffering, both presently and in the future; to have to spend money for medical services, both presently and in the future; to incur lost wages and other economic damage, both presently and in the future; and to suffer mental anguish and loss of enjoyment of life, both presently and in the future.

FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence)

21. Plaintiffs reiterate and reallege the prior allegations of the Complaint as if repeated herein verbatim.

22. Defendant, by and through the acts and omissions of Lambright, for which Defendant is liable, was negligent, reckless, willful, wanton, careless and grossly negligent in the following and other particulars, to-wit:

- a) In failing to keep Tommy and other persons from coming near the area where tree cutting was occurring;
- b) In failing to warn Tommy and other persons of the hazard of the tree cutting;
- c) In failing to take proper precautionary steps to keep persons like Tommy from encountering such hazard;
- d) In failing to require people in the area of the tree cutting to wear proper safety gear;

- e) In otherwise failing to use the degree of care and caution that would have been reasonable and prudent under the circumstances then and there existing; and
- f) Such other and further ways as discovery and trial will prove.

All of which were the direct and proximate cause of the injuries and damages sustained by Tommy, and were in contravention of the statutory and common laws of the *State of South Carolina*.

23. As a direct and proximate result of the willful, wanton, and reckless negligence of the Defendant, Tommy suffered great physical harm and injury from being struck by the tree limb, all of which has caused and will continue to cause him to undergo much physical pain and suffering and mental anguish and distress; has caused and will continue to cause him to have to spend money for medical services; and has caused and will continue to cause him to incur lost wages and other economic damages. Tommy has suffered permanent injury, impairment and disability, has suffered permanent loss of enjoyment of life, and has been otherwise damaged.

24. Tommy is entitled to judgment against Defendant for such an amount of actual and punitive damages as the trier of fact may find, for the costs and disbursements of this action, and for such other and further relief as this Court deems just and proper.

FOR A SECOND CAUSE OF ACTION
(Loss of Consortium)

25. Plaintiffs reiterate and reallege the prior allegations of the Complaint as if repeated herein verbatim.

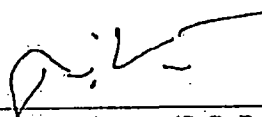
26. As a direct and proximate result of Tommy's injuries as described hereinabove, Plaintiff Mary Hobbs ("Mary") has lost and been deprived of the services of her husband, his society,

companionship, and consortium, as well as the comfort and solace usually provided by a husband in good health and of unimpaired vigor.

27. Plaintiffs are informed and believe that they are entitled to judgment against Defendant for such an amount of actual damages as the trier of fact may find, for the costs and disbursements of this action, and for such other and further relief as this Court may deem just and proper.

WHEREFORE, Plaintiffs pray for judgment against Defendant for such an amount of actual and punitive damages as the trier of fact may find, for the costs and disbursements of this action, and for such other and further relief as this Court deems just and proper.

RESPECTFULLY SUBMITTED,



Raymond T. Wooten (S.C. Bar # 81483)
SMITH, JORDAN & LAVERY, P.A.
1810 Main Street
Post Office Box 1207
Easley, South Carolina 29640
Phone: (864) 855-1661
Fax: (864) 855-1669
wooten@smithjordan.com
Attorney for Plaintiffs

Easley, South Carolina
May 15, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF PICKENS

CIVIL ACTION NO: 2014-CP-39-00613

Charles Thomas Hobbs and Mary Hobbs,

Plaintiffs,

vs.

ANSWER

Fairway Oaks Homeowners Association,

Defendant,

**TO: RAYMOND T. WOOTEN, ESQUIRE, ATTORNEY FOR THE PLAINTIFF AND
THE PLAINTIFF ABOVE NAMED:**

The Defendant answering the Plaintiffs' Complaint would herein respectfully show unto
the Court the following:

FOR A FIRST DEFENSE
(General Denial)

1. The Defendant denies each and every allegation of the Plaintiffs' Complaint not
herein specifically admitted.
2. Paragraphs 1 through 4 are admitted.
3. Paragraphs 5 and 6 are admitted.
4. As for Paragraph 7, the Defendant admits that on or about August 21, 2012, the
Plaintiff was involved in an accident in the common area of the development. Otherwise,
Paragraph 7 is denied.

5. Paragraphs 8 through 20 are denied.

FOR A FIRST DEFENSE AS TO FIRST CAUSE OF ACTION
(Negligent/Gross Negligence)

6. Paragraphs 21 through 24 are denied.

FOR A FIRST DEFENSE AS TO SECOND CAUSE OF ACTION
(Loss of Consortium)

7. Paragraphs 25 through 27 are denied.

FOR A SECOND DEFENSE

8. The Defendant would show upon information and belief, that the Plaintiffs' Complaint fails to state facts sufficient to constitute a cause of action. Therefore, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, the Defendant would move that the Plaintiffs' Complaint be dismissed on the basis of failure to state a cause of action.

FOR A THIRD DEFENSE

9. The Defendant would show, upon information and belief, that the injuries sustained by the Plaintiff were the result of the sole negligence of the Plaintiff and therefore, the Plaintiff cannot recover any sum whatsoever from the Defendant.

FOR A FOURTH DEFENSE

10. The Defendant would show, upon information and belief, that any injuries or damages sustained by the Plaintiff, which are specifically denied, were the result of the acts or omissions of others not in the employ or control of this Defendant and, therefore, the Plaintiff cannot recover from this Defendant in any sum whatsoever.

FOR A FIFTH DEFENSE

11. Such injury or loss as the Plaintiffs sustained, if any, as alleged in the Complaint, was proximately caused and occasioned by the sole negligence, gross negligence, willfulness and wantonness of a third party, in failing to exercise due care and reasonable care for their own safety, which was the direct and proximate cause of injuries or losses suffered by the Plaintiff, if any, and without which the same would not have occurred. Therefore, the Defendant pleads the

sole negligence, willfulness, wantonness, carelessness, recklessness, and gross negligence of a third party as a complete bar to this action against him.

FOR A SIXTH DEFENSE

12. The Defendant would show, upon information and belief, that any injuries or damages sustained by the Plaintiff were due to their own negligent, careless, reckless and grossly negligent acts or omissions which combined and concurred with any negligence on the part of the Defendant, which is specifically denied, to produce such injuries or damages, if any, and without which such injuries or damages would not have occurred; such negligent, careless, reckless and grossly negligent acts or omissions on the part of the Plaintiffs being more particularly set forth as follows:

- a. in failing to keep a proper lookout;
- b. in failing to watch where he was going;
- c. in failing to act as a reasonable and prudent person would have acted under the same or similar circumstance; and
- d. in other ways and particulars that may be shown through discovery and at trial

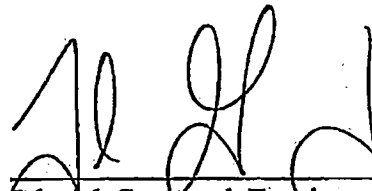
all of which were the direct and proximate cause of any injuries or damages sustained by the Plaintiff and the Defendant pleads such negligence, carelessness, recklessness and gross negligence on the part of the Plaintiff and would ask that this court compare the negligence of the Plaintiff and the Defendant and if it is determined that the Plaintiff's negligence, carelessness, recklessness and gross negligence was greater than the negligence, carelessness, recklessness and gross negligence of the Defendant, which is specifically denied, then the Plaintiff should be totally barred from recovery and if it is determined that the Plaintiff's negligence, carelessness, recklessness and gross negligence is equal to or less than the

negligence of the Defendant, then the amount of recovery available to the Plaintiff should be reduced by the percentage of the Plaintiff's own negligence, carelessness, recklessness and gross negligence.

FOR A SEVENTH DEFENSE

13. The Defendant would show, upon information and belief, that the Plaintiffs' claim for punitive damages violates the Fifth, Sixth, Seventh, Eighth and Fourteenth Amendments to the Constitution of the United States of America in that it violates the double jeopardy clause in that the Defendant could be subjected to multiple awards of punitive damages for the same set of facts; the self-incrimination clause is being violated because the Defendant can be compelled to give testimony against itself in a penalty situation such as punitive damages; the assessment of punitive damages by a burden of proof less than beyond a reasonable doubt is violative of the Sixth and Fourteenth Amendments in that punitive damages are a fine or penalty and are, therefore, quasi-criminal in nature; Plaintiffs' claim for punitive damages violates the Defendant's right to access the courts as guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of punitive damages chills the Defendant's exercise of that right; the Plaintiff's claim for punitive damages violates the Eighth Amendment's guarantee that excessive fines shall not be imposed, the Plaintiffs' claim for punitive damages violates both the due process and equal protection clauses of the Fourteenth Amendment in that the standard for awarding either punitive damages is unduly vague and, therefore, violates both procedural and substantive due process safeguards; therefore, the Plaintiffs' claim for punitive damages should be dismissed.

[Signature on next page]



John M. Grantland, Esquire
Elliott B. Daniels, Esquire
MURPHY & GRANTLAND, P.A.
P.O. Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for Defendant

Columbia, South Carolina
May 20, 2014

STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

Charles Thomas Hobbs and Mary Hobbs

☐ Plaintiffs

v.

Fairway Oaks Townhouse Association,

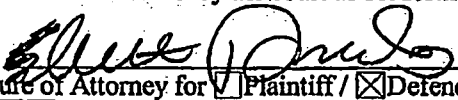
☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2014-CP-39-00613

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Raymond T. Wooten, Esquire Address: 1810 East Main Street Easley, SC 29644 phone: 864-855-1661 fax: 864-855-1685 e-mail: wooten@smithjordan.com other:	Defendant's Attorney: Elliott B. Daniels, Esquire Address: 4406-B Forest Drive Columbia, SC 29206 phone: 803-782-4100 fax: 803-782-4140 e-mail: edaniels@murphygrantland.com other:
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: Motion for Summary Judgment Estimated Time Needed: Court Reporter Needed: ☒ YES / ☐ NO	
SECTION II: Motion/Order Type	
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for ☐ Plaintiff / ☒ Defendant Date submitted: 12-29-14	
SECTION III: Motion Fee	
☒ PAID – AMOUNT: 25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE: _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____	
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED – AMOUNT DUE: _____	

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF PICKENS

CIVIL ACTION NO: 2014-CP-39-00613

Charles Thomas Hobbs and Mary Hobbs,

Plaintiff,

vs.

Fairway Oaks Homeowners Association,

Defendant,

MOTION FOR SUMMARY JUDGMENT

TO: RAYMOND T. WOOTEN, ESQUIRE, ATTORNEY FOR THE PLAINTIFF AND THE PLAINTIFF ABOVE NAMED:

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorneys for the Defendant, Fairway Oaks Homeowners Association, will move before the presiding judge of the Pickens County Court of Common Pleas at the Pickens County Courthouse at 10:00 a.m. on the tenth (10th) day after service hereof, or as soon thereafter as counsel may conveniently be heard, for an Order granting summary judgment in favor of the Defendant, Fairway Oaks Homeowners Association, on grounds that there is no genuine issue as to any material fact.

This Motion is made pursuant to Rule 56 of the South Carolina Rules of Civil Procedure and will be supplemented and supported by such affidavits, depositions, discovery responses, memoranda of law, and such other documents as appropriate.


John M. Grantland, Esquire
Elliott B. Daniels, Esquire
MURPHY & GRANTLAND, P.A.
P.O. Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for Defendant

Columbia, South Carolina
December 29, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF PICKENS

CIVIL ACTION NO: 2014-CP-39-00613

Charles Thomas Hobbs and Mary Hobbs,

Plaintiff,

vs.

Fairway Oaks Homeowners Association,

Defendant,

**MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

**TO: RAYMOND T. WOOTEN, ESQUIRE, ATTORNEY FOR THE PLAINTIFF AND
THE PLAINTIFF ABOVE NAMED:**

Defendant Fairway Oaks Homeowners Association submits this Memorandum of Law in support of its Motion for Summary Judgment. For the reasons set forth herein and in the Motion previously filed and served, Defendant asserts that there is no genuine issue as to any material fact, and that Defendant is entitled to judgment as a matter of law pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

SUMMARY

Plaintiff himself hired an independent contractor to remove a tree limb on HOA common area grounds. Plaintiff was injured while standing under a tree as the independent contractor removed the limb with a chainsaw and the limb fell on Plaintiff's head. Plaintiff is suing the Defendant HOA – of which Plaintiff was the President – for the negligence of the independent contractor that Plaintiff hired. Defendant is not liable for the negligence of the independent contractor that Plaintiff hired, and no exception to the general independent contractor rule applies. Accordingly, Defendant is entitled to judgment as a matter of law.

FACTUAL BACKGROUND

On August 21, 2012, Plaintiff was injured on Fairway Oaks Townhouse (hereinafter "Fairway Oaks") common area grounds in Easley, S.C. when a tree limb being removed by

independent contractor fell and struck Plaintiff on the head. In a light most favorable to Plaintiff, the undisputed facts are as follows:

Plaintiff is a longtime resident of Fairway Oaks, and in the five years before Plaintiff's injury, Plaintiff served as President of Fairway Oaks Homeowners Association (hereinafter "HOA" or "Defendant"). (Hobbs Depo. 15:18, attached hereto as Exhibit A). As President of the HOA, Plaintiff arranged for the maintenance and repairs of Fairway Oaks' common areas.

On August 18, 2012 resident Benny Roper called Plaintiff to request the removal of a tree limb hanging over his unit. (Hobbs Depo. 28:24-29:9). Plaintiff advised Roper that he would hire a professional tree service based out of Liberty, S.C. on behalf of the HOA to remove the limb. (Roper Depo. 24:13-25:5, attached hereto as Exhibit B).

Instead, during a golf outing, Plaintiff asked a personal friend, Lee Lambright, to remove the limb. (Hobbs Depo. 11-21). Although Plaintiff hired Lambright for odd jobs at Fairway Oaks over the years, Lambright explained: "I am not a contractor. I am just a neighborhood friend, and I do a lot of little projects for people." (Lambright Depo. 11:25-12:6, attached hereto as Exhibit C). Lambright had no training in limb removal, and he had never been hired before to remove tree limbs. (Lambright Depo. 12:8-16:6). Lambright agreed to remove the limb if Plaintiff would help, to which Plaintiff responded, "Okay, I'll help you." (Hobbs Depo. 29:11-21). Plaintiff admitted he hired Lambright because Lambright was much less expensive than a professional tree service. (Hobbs Depo. 19:14-17, 55:15-20).

On August 21, 2012, Plaintiff and Lambright met at Fairway Oaks, Plaintiff helped remove the ladder from Lambright's truck, and he directed Lambright where to proceed with his work. (Lambright Depo. 25:6-26:22). Plaintiff help Lambright set the ladder against the tree and held the bottom of the ladder as Lambright climbed up and began to remove branches with a chainsaw. (Lambright Depo. 26:18-22). Plaintiff remained under or near the tree as Lambright removed branches with a chainsaw. (Roper Depo. 41:22-25). Plaintiff admitted it was his own choice to be

present, and that it was his own choice to stand where he was standing. (Hobbs Depo. 50:10-18). Witnesses have indicated there were safer areas for Plaintiff to stand. (Roper Depo. 43:3).

A large limb fell and struck Plaintiff on the head as Lambright removed branches with a chainsaw without the assistance of a bucket or a rope. (Lappin Depo. 37:20-38:24, attached hereto as Exhibit D, Roper Depo. 38:1-22). Lambright explained the branch "did a somersault" and struck Plaintiff on the head. (Lambright Depo. 34:3-14).

On May 14, 2014, Plaintiff filed suit against Fairway Oaks HOA. Relevant discovery is complete, and there are no material facts in dispute. Defendant moved for summary judgment on December 29, 2014, respectfully requesting the court to find as a matter of law that Fairway Oaks HOA is not liable for the negligence of the independent contractor Plaintiff hired.

STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Flemming v. Rose*, 350 S.C. 488 (2002); *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271 (Ct. App. 2002). Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC.

Written discovery and depositions of all fact witnesses are complete. There is no genuine issue of material fact in dispute. Considering the facts in a light most favorable to the Plaintiff, Defendant is not liable for the independent contractor Lee Lambright's negligence, and Defendant is entitled to summary judgment as a matter of law.

ARGUMENT

Defendant is not liable for the negligence of an independent contractor that Plaintiff hired, and no exception to the general independent contractor rule applies. Accordingly, Defendant is entitled to judgment as a matter of law.

I. Defendant is not liable for the negligence of independent contractor Lee Lambright.

Generally, under South Carolina law, a principal that hires an independent contractor is not liable for the negligence of that independent contractor, or for harm caused by that negligence. *Cherry v. Myers Timber Co., Inc.*, 404 S.C. 596, 745 S.E.2d 405 (Ct. App. 2013) (holding that timber company was not responsible for torts of logger hired to harvest and haul timber to mills because the logger was an independent contractor); *See* 18 S.C. Jur. Negligence § 35.

Here, it is undisputed that Lambright acted as an independent contractor, and it is undisputed that Lambright was negligent. Indeed, Plaintiff himself – who hired Lambright – admitted Lambright was acting as an independent contractor, and Lambright admitted to several mistakes were made in his work. *Cherry v. Myers Timber Co.*, 404 S.C. 596, 601, 745 S.E.2d 405, 407 (Ct. App. 2013) (Lambright Depo. 22:6-8; Hobbs Depo. 27:18-19). Nonetheless, the general rule applies: Defendant is not liable for the negligence of Lambright because Lambright was an independent contractor.

There is also evidence of Plaintiff's own negligence. It was Plaintiff – not the HOA – who hired Lambright and elected not only to help Lambright, but to stand under the branch as it was being cut by a chainsaw. Lambright testified "Of course," Plaintiff shares responsibility for the accident, explaining it was Plaintiff's choice to help, that Plaintiff knew the limb was coming down, and that the accident would have been avoided if Plaintiff's stood in a safer place. (Lambright Depo. 39:4-40:3; 42:5-43:8). Lappin similarly testified the accident would have been avoided if Plaintiff waited until after the limbs fell to walk under the tree. (Lappin Depo. 52:12-16). Roper was clear in his testimony that Plaintiff—and not the HOA—bears responsibility for this accident:

- Q. [W]ould it be your testimony that ... responsibility for this accident rests with Mr. Lambright and with Mr. Hobbs?
A: Yes, sir.
Q: And it does not rest with the HOA?
A: No, sir.

(Roper Depo. 14:25, 47:20-25).

On the other hand, there is no testimony indicating the Defendant HOA was negligent in causing Plaintiff's injury. Roper was asked: "Do you think the HOA did anything wrong to cause Mr. Hobbs' injury," to which he answered "No, sir." (Roper Depo. 47:16-18). Lappin was also clear: "I don't think this is the HOA's fault," and when asked: "Do you believe the HOA did anything wrong to cause this accident," he answered, "No." (Lappin Depo. 44:17, 46:2-4). Only Lambright testified that the Plaintiff should have hired a professional on behalf of the HOA – a decision Plaintiff admits was solely his own. (Lambright Depo. 44:3-45:2, Hobbs Depo. 55:15-17). In other words, the only mistake the HOA could have made, according to witness testimony, was a mistake made by Plaintiff himself: hiring a non-professional instead of a professional tree service.

Plaintiff also could not identify anything specific Defendant did to cause this accident. In his Complaint, Plaintiff alleged Defendant "failed to keep Tommy and other persons from coming near the area where the tree cutting was occurring," yet in his deposition Plaintiff testified Defendant did *not* require Plaintiff to go to the limb removal site or stand where Plaintiff did; both were admittedly Plaintiff's own choice. (Hobbs Depo. 54:5-11). Plaintiff also alleged Defendant "failed to warn Tommy or other persons of a hazard of tree cutting," yet in his deposition Plaintiff admitted he "was aware," that he was warned, and that the accident occurred because Plaintiff thought he was standing at a safe distance. (Hobbs Depo. 54:14-55:10). Beyond this, Plaintiff was asked whether he could identify anything the HOA did to cause this accident:

- Q. Is there anything that you can think of that the Homeowners Association, who you're suing, is there anything that you can think of that they should have done differently to have kept this accident from happening?
- A. Well, there's nothing -- I couldn't go any farther.
- Q. Yes, sir.
- A. I would say no, other than we had to get the tree cut because it was going to fall on his house if we didn't, that would be the only thing right now that I could say...

(Hobbs Depo. 57:4-14).

Rather, all evidence points to the negligence two parties: Plaintiff and independent contractor Lee Lambright. However, Defendant is not liable for Plaintiff's own negligence, and the general

independent contractor rule is clear and it applies here: “an employer is not liable for the torts of an independent contractor.” *Cherry v. Myers Timber Co., Inc.*, 404 S.C. 596, 745 S.E.2d 405 (Ct. App. 2013) (*emphasis added*). Because Lambright is an independent contractor, Defendant is not liable for Lambright’s negligence, and Defendant is entitled to judgment as a matter of law.

II. There are no exceptions to take this case out of the general independent contractor body of law: The landlord-tenant exception does not apply.

While the general rule is clear – in South Carolina, a principal is not responsible for the negligence of an independent contractor – a few, particularized exceptions have been recognized under the “nondelegable duty doctrine.” However, no exception applies here.

Upon belief, Plaintiff seeks an exception that is applicable only in the landlord-tenant context: “*a landlord* who undertakes repair of his property by use of a contractor has a nondelegable duty to see that the repairs done properly, and remains vicariously liable for injuries caused by improper repairs.” *Simmons v. Tuomey Reg’l Med. Ctr.*, 341 S.C. 32, 43, 533 S.E.2d 312, 318 (2000), *citing Conner v. Farmers and Merchants Bank*, 243 S.C. 132, 139–40, 132 S.E.2d 385, 388–89 (1963); *Durkin v. Hansen*, 313 S.C. 343, 437 S.E.2d 550 (Ct.App.1993). The landlord-tenant exception applies when two conditions are present: (1) there is a relationship of landlord and tenant, and (2) the landlord undertakes repairs. *See Durkin v. Hansen*, 313 S.C. at 346.

Here, *the landlord-tenant exception does not apply: Defendant is not a landlord and Plaintiff is not a tenant*. This case has no nexus to a landlord-tenant relationship, and this case does not involve a landlord who undertakes repairs. *Rather, Defendant is an HOA, and Plaintiff was its President*. Plaintiff offers no statutory support and no case law that imputes the duties and obligations of a landlord onto an HOA.

Even assuming, *arguendo*, that this claim were brought in the landlord-tenant context, and the exception did apply, the exception would leave the Plaintiff himself liable for the independent contractor’s negligence. The exception provides “the *delegating person* remains liable for that

breach.” *Simmons v. Tuomey Reg’l Med. Ctr.*, 341 S.C. at 42. Plaintiff admits it the Plaintiff alone who delegated the limb removal work to Lambright. (Hobbs Depo. 55:15-17).

Nevertheless, the exception Plaintiff seeks is applied exclusively in the landlord-tenant context and has never been applied against an HOA. However, the landlord-tenant exception does not apply here: Defendant is not a landlord, and Plaintiff is not a tenant. There is no exception that removes this case from the general independent contractor rule, and Defendant is entitled to judgment as a matter of law.

CONCLUSION

Defendant is not liable for the negligence of an independent contractor that Plaintiff hired, and the landlord-tenant exception to this rule does not apply because the Defendant is not a landlord, and Plaintiff is not a tenant. Accordingly, Defendant is entitled to judgment as a matter of law, and respectfully requests the court grant its Motion for Summary Judgment.

MURPHY & GRANTLAND, P.A.



John M. Grantland, Esquire

Elliott B. Daniels, Esquire

P.O. Box 6648

Columbia, South Carolina, 29260

(803) 782-4100

Attorneys for Defendant Fairway Oaks Homeowner's Association

Columbia, South Carolina
August 5, 2015

EXHIBIT A

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF PICKENS)

CHARLES THOMAS HOBBS and
MARY HOBBS

Plaintiffs,

vs.

FAIRWAY OAKS HOMEOWNERS
ASSOCIATION

Defendant.

Case Number
2014-CP-39-00613

Deposition of

CHARLES THOMAS HOBBS

A witness called by Counsel on behalf of the Defendant, pursuant to Rule 30 of the South Carolina Rules of Civil Procedure, taken before Sandy E. Martin, Professional Court Reporter and Notary Public in and for the State of South Carolina, on Thursday, November 14, 2014, at Smith, Jordan & Lavery, P.A., 1810 East Main Street, Easley, South Carolina, commencing at the hour of 10:03 a.m.

APPEARANCES:

REPRESENTING THE PLAINTIFF:

Raymond T. Wooten, Esquire
Smith, Jordan & Lavery, P.A.
1810 E. Main Street
Easley, SC 29640
Wooten@smithjordan.com
864-855-1661

REPRESENTING THE DEFENDANT:

John M. Grantland, Esquire
Murphy & Grantland, P.A.
4406-B Forest Drive
Columbia, SC 29206
Jgrantland@murphygrantland.com
803-454-1237

ALSO PRESENT:

Mary Hobbs

INDEX

<u>WITNESS</u>	<u>PAGE</u>
CHARLES THOMAS HOBBS	
DIRECT EXAMINATION BY MR. GRANTLAND	6
CROSS-EXAMINATION BY MR. WOOTEN	82
REDIRECT BY MR. GRANTLAND	88
REPORTER CERTIFICATE	91

EXHIBITS

<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>PAGE</u>
Defendant's Exhibit No. 1	Photograph	38

LEGEND OF THE TRANSCRIPT

dashes [---] intentional or purposeful interruption
Ellipsis [...] Unfinished thought.
(Words transcribed as spoken)

S T A T E M E N T S

It was agreed by and between counsel for the respective parties that the reading and signing of the deposition transcript is waived.

WHEREUPON:

CHARLES THOMAS HOBBS,

being duly sworn, on oath, was questioned
and testified as follows:

MR. GRANTLAND: Mr. Hobbs, good morning.

THE WITNESS: Good morning.

MR. GRANTLAND: My name is John Grantland. I'm a lawyer from Columbia and I was hired to represent Fairway Oaks Homeowners Association in a lawsuit that you brought with your attorney, and I've asked you to be here today in your lawyer's office to take your deposition.

And what a deposition is, is really a conversation or an interview mainly for me to talk to you, find out some information about you, but mainly find out about the circumstances of the accident and the injuries you may have had as a result of the accident. I know a good bit already from your lawyer and I'll do my best not to waste

1 have any other doctors you saw on a regular basis
2 before this accident?

3 A. Regular basis?

4 Q. Like did you have a cardiologist?

5 A. Yes.

6 Q. Who is your cardiologist?

7 A. Dr. Trey Ridgeway.

8 Q. Okay.

9 A. He did my bypass surgery on 2001.

10 Q. Is he in Greenville?

11 A. Yes, he's in Greenville. Not radiologist. What's
12 the word?

13 Q. I can find him.

14 A. Cardiologists;

15 Q. Cardiologists. Okay.

16 A. I can't say it.

17 Q. That's okay.

18 A. I'm sorry.

19 THE WITNESS: I keep looking at you for names.

20 Q. [Mr. Grantland] No, that's okay.

21 How was your health before August 2012?

22 A. Perfect. I played golf. I moved to the golf
23 course, retired at 55.

24 Q. And you played golf pretty regularly before this
25 accident?

1 A. About every day.

2 Q. Were you on any prescriptions at the time of this
3 accident?

4 A. No.

5 Q. No?

6 A. No.

7 Q. Did you have any issues with your legs or your feet
8 burning before this accident? Like did you have any
9 neuropathy problems before this accident?

10 A. Before the accident?

11 Q. Yes, sir.

12 A. I had some where I had some burning. I went to a
13 local and I took a pill and it healed it up.

14 Q. Who did you see?

15 A. I'm sorry, but I'm having trouble remembering.

16 Q. That's okay. You saw a local doctor for burning?

17 A. Yes, just burning feet.

18 Q. Burning feet?

19 A. Yeah.

20 Q. And he gave you a pill and that helped?

21 A. Yeah, that's gone. I can't think of the name. I'm
22 sorry.

23 Q. That's okay. Would it be Chandler, does that name
24 ring a bell?

25 A. That's the heart doctor.

1 Q. But whatever he did, whatever the doctor did for you
2 with a pill --

3 A. He gave me a pill and it went away. I haven't had
4 it since.

5 Q. Even after this accident, you haven't had that
6 burning feet problem since?

7 A. No, I haven't had burning nothing.

8 Q. Okay. Good.

9 A. Toes or nothing, legs or nothing.

10 Q. Good. All right. Now, when did you move to Fairway
11 Oaks?

12 A. In 2002.

13 Q. I guess when you moved to Fairway Oaks, did you
14 immediately join the homeowners association?

15 A. You're automatically a homeowner. There's 18 units.

16 Q. And have you held positions with the homeowners
17 association?

18 A. President from 2007. I resigned after I couldn't do
19 my duties from this accident, after this accident.

20 Q. Approximately, when did you resign, if the accident
21 was in August 2012?

22 A. That's when I -- not long after. We had a paint job
23 going on and I wanted to finish it. I didn't do
24 anything but walk around to make sure they showed
25 up, that's all. I didn't do anything else.

1 Q. You said you were president from 2007 --

2 A. '07 until about --

3 Q. -- August, September 2012?

4 A. Something like that. Yeah, seven years exactly. I
5 looked on the minutes of the notes that we took and
6 it was July 7th.

7 Q. And before 2007, did you hold any other positions
8 with the homeowners association?

9 A. No.

10 Q. This isn't meant to be a stupid question, but what
11 was your job responsibility as the president of the
12 homeowners association?

13 A. It's going to be a stupid answer.

14 Q. That's okay.

15 A. This is 18 units. They're all about 65 to 90. The
16 guy that had it was unhealthy, he couldn't keep it.
17 So I was the youngest, so I got volunteered at one
18 meeting -- would I take it. And I had took a lot of
19 positions at 3M and they kind of volunteered me. We
20 only meet once a year and they volunteered me, kind
21 of.

22 Q: Were you at the meeting?

23 A. Yes. I didn't vote, but I was at the meeting.

24 Q. I was thinking that the best way to get elected to
25 something is to not show up.

1 Q. How about roofers, did you ever have to pick
2 roofers?

3 A. I picked a roofer -- picked the painters.

4 Q. And the same type of situation, you get three
5 quotes?

6 A. Three quotes. Those were driven by price, because I
7 didn't know those people.

8 Q. You didn't know the roofers?

9 A. I didn't never treat a roofer, no. I had a guy that
10 had told me he had used him before. I got a guy
11 that lives two doors from me is a realtor in Easley
12 and he has contacts with plumbers, roofers,
13 painters. He gave me a list and I just picked one
14 and I started calling.

15 Q. The same with plumbers, did you ever hire plumbers,
16 as well?

17 A. I never hired a plumber. And the plumbers was the
18 same situation, the guy had gave me a listing of
19 plumbers to call, because I never had any -- I mean
20 --

21 Q. No, but I mean, was that --

22 A. I never had \$30,000 worth of painting done before.

23 Q. Yes, sir, but was that your job? Like if someone
24 needed plumbing, if someone had a leak, you'd get a
25 --

1 putting carpet down, that's the only thing, or tile.
2 It's the only two things he ever told me he didn't
3 like to do. He would do them for me, but he
4 wouldn't like to do them, and they were the only two
5 things that he didn't really like to do. He'd do
6 other things, but he didn't -- because of me, he
7 would do them.

8 Q. He wasn't incorporated, was he?

9 A. Well, I don't know that. I don't know his bonding
10 or anything.

11 Q. But you all would just write him checks to Lee
12 Lambright?

13 A. Right, based on me judging that he could do it.

14 Q. Was he ever an employee of the HOA?

15 A. No, none of us were. We never got paid a dime.

16 Q. He'd be, I guess, independent?

17 A. He would, but we wasn't.

18 Q. He'd be like an independent contractor?

19 A. Right. He'd normally charge \$25 an hour, but as I
20 told you, he may charge -- friend to you, nothing,
21 10, \$15. I never had a job where he went over 15,
22 \$20 for me.

23 Q. Now, before this accident, Mr. Hobbs, had you ever
24 had any experience cutting tree limbs?

25 A. No. I am not a mechanical person. I couldn't even

1 A. They'd call me.

2 Q. Right.

3 A. And I'm no mechanic, and my wife can speak for that.
4 And I would usually call Lee, tell him to come look
5 at it and see if he could do it. He'd be honest to
6 me if he couldn't do it. He'd say, "You need to get
7 somebody," and we'd get somebody. He may recommend
8 somebody, but he would tell me honestly that he
9 couldn't do it.

10 Q. In the 12 years you were president, what was the
11 biggest job you had to hire somebody to do?

12 A. Painting and roofing.

13 Q. Painting and roofing. Okay.

14 A. Twice. I got to do it about four months after I
15 moved in, but I helped. I was on the committee, but
16 I wasn't president.

17 Q. But while you were president?

18 A. It was my second time to do them, both of them, but
19 the roof I didn't do twice, only painting.

20 Q. Now, back to Mr. Lambright. So he had done, as a
21 handyman, besides picking up limbs for the guy who
22 overcharged you, what other little things did he do
23 for you?

24 A. Put washers in and stuff. Fixed anything that
25 needed it. I mean, he once told me he didn't like

1 crank a chainsaw. I don't even know how to crank
2 one.

3 Q. And I assume before this accident you've never had
4 any issues with anything Mr. Lambright had done at
5 Fairway Hills?

6 A. Oh, Lord, no. Good Christian man, goes to Rock
7 Springs. He's there when they open the door.

8 Q. That's a big, big church.

9 A. That's the building. He's there when they open the
10 door. Both the preacher and his son are members of
11 Smithfield. No.

12 Q. Are you a member of Rock Springs?

13 A. No.

14 Q. What church are you all members of?

15 A. Trinity Point. I'm the treasurer at Trinity Point.

16 Q. Is that a Baptist church?

17 A. Yes.

18 Q. I grew up Baptist. I moved to Columbia and married
19 a Methodist, but that's another story.

20 A. I was a Methodist.

21 Q. Let me take you now to the date of the accident.

22 How is it that you got Mr. Lambright out there
23 that day?

24 A. I got a phone call on Friday night. We had a
25 gentleman who moved in the end unit, I'd say, a

1 month before. He called me on Friday night.
 2 Q. Who is that?
 3 A. Benny Roper. And he said, "Mr. Hobbs, I know you
 4 don't know me real well and you probably don't even
 5 know me. I've got a tree limb broke back here. I'm
 6 afraid it's going to fall on my house. Would you
 7 come down and look at it?" And it wasn't quite
 8 dark, so I walked down to the back and it had broken
 9 and it was hanging.
 10 Q. Right.
 11 A. So I play golf with Lee on Saturday. I said, well
 12 I'll just save this \$700 that this guy is going to
 13 charge me, or eight, no more than that it, that
 14 ain't but one or two cuts. So when I played golf
 15 with Lee, he says, -- I've been told this and I
 16 don't remember it, "But you've got to help me load
 17 my ladder. I can't load it by myself."
 18 Q. Right.
 19 A. And I said, "Okay, I'll help you." I don't remember
 20 him asking me or any of that. I don't remember
 21 anything with that part, okay.
 22 Q. Where did you all play golf?
 23 A. Smithfield.
 24 Q. Smithfield. Okay. I'm sorry.
 25 A. I live across the street from it.

1 Q. I'm not a golfer, so I'm sorry.
 2 A. All right. So I don't remember helping him or
 3 anything. I remember the call. And I told the guy
 4 that we'd come look at it.
 5 Q. So you played golf with him on Saturday?
 6 A. Sunday -- he's a Christian man. We don't work on
 7 Sunday. It poured down rain on Monday. I mean,
 8 monsooned. So we didn't do it Monday, obviously.
 9 So Tuesday it didn't rain. So rain didn't bother
 10 him being up there because we knew it wasn't going
 11 to take ten minutes to cut this tree limb down.
 12 Q. So he came out on Tuesday?
 13 A. Yes.
 14 Q. I guess he came out Tuesday morning?
 15 A. Yes, about nine or ten o'clock.
 16 Q. Tell me what you remember. Had he been to look at
 17 the tree before?
 18 A. On Saturday with me, that's all I remember about the
 19 tree.
 20 Q. And that's when y'all had the conversation about,
 21 "You're going to have to help me with the ladder,"
 22 or something like that?
 23 A. Yes, and that's all he mentioned about the tree, was
 24 the ladder.
 25 Q. So he comes out on Tuesday. Does he bring his

1 ladder and saw or is that --
 2 A. I don't know. I don't know.
 3 Q. Does the HOA have a ladder?
 4 A. No. I can honestly say no. We don't have a ladder.
 5 Q. Do y'all have any --
 6 A. We don't have any tools.
 7 Q. I was going to ask do you all provide Mr. Lambright
 8 with any tools?
 9 A. He has his own.
 10 Q. He has his own tools.
 11 A. Or he goes and borrows.
 12 Q. So the day of, do you remember anything leading up
 13 to the accident?
 14 A. No, I don't even remember getting out of bed.
 15 Q. Really?
 16 A. The whole day.
 17 Q. The whole day is just kind of --
 18 A. Nothing. When you put 48 staples in your head, you
 19 don't remember a whole lot.
 20 Q. Yes, sir. I'm not trying to doubt you.
 21 A. You don't doubt me, no, I know.
 22 Q. I just need to make sure it's clear to me. So if I
 23 ask you anything about the circumstances before the
 24 accident or the accident itself, you have no memory
 25 of it?

1 A. This is embarrassing to say, but --
 2 Q. It's not embarrassing.
 3 A. I didn't know her name for two months, and one night
 4 I laid in bed and cried.
 5 Q. This is in the hospital?
 6 A. Just give me a minute.
 7 Q. Yes, sir. We can take a break if you want.
 8 [Off the record]
 9 A. I called her baby for 49 years. And I couldn't
 10 remember Mary. And finally I got embarrassed and
 11 called her, sat on the side of the bed and told her
 12 that I couldn't remember her name.
 13 Q. Yes, sir.
 14 A. And that was, like I said, probably two months after
 15 I got out the hospital and got home, and I was still
 16 in the bed 24 hours a day, seven days a week. She
 17 brought my food to me.
 18 Q. Yes, sir. And again, just to make sure I'm clear,
 19 you have no memory of that day?
 20 A. Nothing. I don't remember getting up, nothing.
 21 Q. You don't remember Mr. Lambright coming?
 22 A. No. I don't remember going to his house, I don't
 23 remember taking the kid to school, I don't remember
 24 putting my clothes on, I don't remember going to get
 25 no ladder, I don't remember helping him set up, I

9

1 A. No.

2 Q. I assume you never treated for drug or alcohol

3 abuse?

4 A. No.

5 Q. And this is a civil lawsuit that you filed against

6 the homeowners' association.

7 Have you ever been involved in any other

8 lawsuits?

9 A. No, never in my life.

10 Q. Before August 2012, have you ever been hospitalized?

11 A. Yes.

12 Q. Can you just generally tell me what you --

13 A. I had a spleen removed when I was 20. I got hit.

14 Q. I don't need to know anything about that.

15 How about in the last ten years before this

16 accident?

17 A. Left knee replaced.

18 Q. Did they actually hospitalize you for that?

19 A. Yes. Yeah, I stayed about five days.

20 Q. In Greenville?

21 A. No, in Mount Pleasant.

22 MS. HOBBS: No.

23 MR. GRANTLAND: I don't mean to be rude to you,

24 Mary.

25 Q. [Mr. Grantland] But you were hospitalized for a

10

1 left knee?

2 A. Yeah, I had a knee replacement.

3 Q. Who did your surgery?

4 A. Dr. David Poletti.

5 Q. I know Steven Poletti. Is it Steven Poletti?

6 A. Steven Poletti, I believe is his name, yes.

7 Q. Yes, I think that's his name.

8 A. I'm sorry.

9 Q. With Southeastern Spine. When my dad had his knee

10 replaced, it was just because it was just worn out.

11 A. Bone-on-bone.

12 Q. Yes, worn out. So you didn't have any injury or

13 anything?

14 A. No.

15 Q. Yours was just bone on bone?

16 A. Right.

17 Q. That would have been, approximately, when?

18 A. About four years ago, five years ago. I'm not

19 exactly sure.

20 Q. Any other hospitalizations, say, in the last ten

21 years before the accident?

22 A. You'd better sharpen your pencil. I've had a knee

23 replacement. All of mine were -- I've had a lung

24 collapse, knee replacement, spleen removed. I had

25 sleep apnea done.

11

1 THE WITNESS: I know you can't tell me.

2 A. But I've had some more.

3 Q. That's all right. Do you have a primary care doctor

4 here in Easley?

5 A. Dr. Richard Koch.

6 Q. Richard Koch?

7 A. He spells it K-o-c-h.

8 Q. But it's pronounced Cook?

9 A. Uh-huh.

10 Q. He is in Powdersville?

11 A. Powdersville Family Practice.

12 Q. And how long has he been your primary care doctor?

13 A. Since January. My original doctor, Junker, retired

14 at the end of December. We'd been with him 30

15 years.

16 Q. Is he in the same practice?

17 A. Yes. There's only two there now.

18 Q. So if I wanted to see your family doctor records for

19 the last ten years, I just would look at

20 Powdersville Family Practice?

21 A. Yes.

22 Q. Before this accident, had you ever treated with a

23 neurologist?

24 A. No.

25 Q. The orthopaedist you saw before this accident was

12

1 Poletti?

2 A. Knee.

3 Q. Poletti for your knee?

4 A. Well, Poletti now didn't do my knee.

5 Q. Who did your knee?

6 A. My knee was done by Dr. Ridgeway.

7 Q. Ridgeway?

8 A. Poletti did my neck.

9 Q. That was after the accident?

10 A. Yeah, after it.

11 Q. And Ridgeway is down in Charleston?

12 A. No.

13 Q. No?

14 A. He's in Greenville Radial -- or Piedmont

15 Orthopaedics. Excuse me.

16 Q. Piedmont Orthopaedics. I know them. Poletti did

17 your neck?

18 A. He did my neck.

19 Q. That's after the accident?

20 A. Yes. I'm sorry.

21 Q. And I'll talk about that.

22 A. I'm sorry.

23 Q. That's okay.

24 A. I get my days and times mixed up.

25 Q. Other than Powdersville Family Practice, did you

1 have any other doctors you saw on a regular basis
 2 before this accident?
 3 A. Regular basis?
 4 Q. Like did you have a cardiologist?
 5 A. Yes.
 6 Q. Who is your cardiologist?
 7 A. Dr. Trey Ridgeway.
 8 Q. Okay.
 9 A. He did my bypass surgery on 2001.
 10 Q. Is he in Greenville?
 11 A. Yes, he's in Greenville. Not radiologist. What's
 12 the word?
 13 Q. I can find him.
 14 A. Cardiologists.
 15 Q. Cardiologists. Okay.
 16 A. I can't say it.
 17 Q. That's okay.
 18 A. I'm sorry.
 19 THE WITNESS: I keep looking at you for names.
 20 Q. [Mr. Grantland] No, that's okay.
 21 How was your health before August 2012?
 22 A. Perfect. I played golf. I moved to the golf
 23 course, retired at 55.
 24 Q. And you played golf pretty regularly before this
 25 accident?

1 A. About every day.
 2 Q. Were you on any prescriptions at the time of this
 3 accident?
 4 A. No.
 5 Q. No?
 6 A. No.
 7 Q. Did you have any issues with your legs or your feet
 8 burning before this accident? Like did you have any
 9 neuropathy problems before this accident?
 10 A. Before the accident?
 11 Q. Yes, sir.
 12 A. I had some where I had some burning. I went to a
 13 local and I took a pill and it healed it up.
 14 Q. Who did you see?
 15 A. I'm sorry, but I'm having trouble remembering.
 16 Q. That's okay. You saw a local doctor for burning?
 17 A. Yes, just burning feet.
 18 Q. Burning feet?
 19 A. Yeah.
 20 Q. And he gave you a pill and that helped?
 21 A. Yeah, that's gone. I can't think of the name. I'm
 22 sorry.
 23 Q. That's okay. Would it be Chandler, does that name
 24 ring a bell?
 25 A. That's the heart doctor.

1 Q. But whatever he did, whatever the doctor did for you
 2 with a pill --
 3 A. He gave me a pill and it went away. I haven't had
 4 it since.
 5 Q. Even after this accident, you haven't had that
 6 burning feet problem since?
 7 A. No, I haven't had burning nothing.
 8 Q. Okay. Good.
 9 A. Toes or nothing, legs or nothing.
 10 Q. Good. All right. Now, when did you move to Fairway
 11 Oaks?
 12 A. In 2002.
 13 Q. I guess when you moved to Fairway Oaks, did you
 14 immediately join the homeowners association?
 15 A. You're automatically a homeowner. There's 18 units.
 16 Q. And have you held positions with the homeowners
 17 association?
 18 A. President from 2007. I resigned after I couldn't do
 19 my duties from this accident, after this accident.
 20 Q. Approximately, when did you resign, if the accident
 21 was in August 2012?
 22 A. That's when I -- not long after. He had a paint job
 23 going on and I wanted to finish it. I didn't do
 24 anything but walk around to make sure they showed
 25 up, that's all. I didn't do anything else.

1 Q. You said you were president from 2007 --
 2 A. '07 until about --
 3 Q. -- August, September 2012?
 4 A. Something like that. Yeah, seven years exactly. I
 5 looked on the minutes of the notes that we took and
 6 it was July 7th.
 7 Q. And before 2007, did you hold any other positions
 8 with the homeowners association?
 9 A. No.
 10 Q. This isn't meant to be a stupid question, but what
 11 was your job responsibility as the president of the
 12 homeowners association?
 13 A. It's going to be a stupid answer.
 14 Q. That's okay.
 15 A. This is 18 units. They're all about 65 to 90. The
 16 guy that had it was unhealthy, he couldn't keep it.
 17 So I was the youngest, so I got volunteered at one
 18 meeting -- would I take it. And I had took a lot of
 19 positions at 3M and they kind of volunteered me. We
 20 only meet once a year and they volunteered me, kind
 21 of.
 22 Q. Were you at the meeting?
 23 A. Yes. I didn't vote, but I was at the meeting.
 24 Q. I was thinking that the best way to get elected to
 25 something is to not show up.

17

1 A: Is don't show up, right.

2 Q: I've been elected by not showing up, so I can

3 appreciate that.

4 Now, as president, was one of your duties

5 hiring contractors to do work around the HOA?

6 A: It was to go through me. I had to approve them. It

7 could be recommended by secretary, treasurer, or

8 anybody, but I had to approve them.

9 Q: How about supervising contractors, did that go

10 through you, as well?

11 A: When you say supervising contractors, go to them if

12 I wanted something?

13 Q: Yes, sir.

14 A: Yeah. If they missed a spot painting, I'd tell

15 them. If they missed a shingle, I'd tell them,

16 stuff like that, but I had a handyman that did a lot

17 of our handy stuff.

18 Q: Who was your handyman? Was that Lee Lambright?

19 A: Lee Lambright.

20 Q: Let me ask you about Lee. How long have you known

21 Mr. Lambright?

22 A: Thirty years.

23 Q: Did you all work together at 3M?

24 A: No, I met him at the golf course. I play golf with

25 him.

18

1 Q: I guess y'all are friends?

2 A: Good Christian friends.

3 Q: I assume you have his contact information. If we

4 need to find him or talk to him, we could do that?

5 A: Uh-huh. Raymond.

6 Q: Raymond has it?

7 A: I think Raymond has it.

8 THE WITNESS: Don't you, Raymond?

9 MR. WOOTEN: I think I probably do. I can get

10 that for you, if you need that.

11 MR. GRANTLAND: Okay.

12 A: Yeah, if he don't, I can get it.

13 Q: So he's been a friend for, approximately, 30 years?

14 A: Uh-huh..

15 Q: Do you know what his background is in, what work did

16 he do before he was --

17 A: He's from the Amish Country, so he's from up in --

18 Q: He's from Pennsylvania?

19 A: Yeah.

20 Q: Now, does he have any licenses?

21 A: That, I don't know. You mean, contract licenses?

22 Q: Yes, sir, like a licensed plumber?

23 A: Bonded and everything like that?

24 Q: Yes, sir.

25 A: He may be bonded.

19

1 Q: But, you know, like a licensed roofer or a licensed

2 contractor?

3 A: No, I don't know that.

4 Q: How long has Mr. Lambright been the handyman for the

5 --

6 A: Twelve years.

7 Q: Twelve years?

8 A: The guy that they had was ripping them off.

9 Q: Who was that?

10 A: I don't know. He was charging them 125 and Lee

11 charges 25. So as soon as I got president, I let

12 him go because he was ripping them.

13 Q: He was charging them 125 an hour?

14 A: For the job. And a job would be \$25. You know, Lee

15 would charge 25 and he would charge 125. I didn't

16 get rid of him for the friend, I got rid of him for

17 the economics of the homeowners association.

18 Q: Right.

19 A: I could care less who they had.

20 Q: Did Lee charge 25 a job or 25 an hour, or do you

21 know?

22 A: Sometimes he didn't even charge me.

23 Q: Did he live out there?

24 A: No, he lives at Smithfield, but he didn't live at

25 homeowners.

20

1 Q: Is Smithfield here in Easley?

2 A: Yes, it's part of the group. Barnes and Dart built

3 it. Dart just died yesterday. Alvin Dark passed

4 away yesterday. It's in the morning paper.

5 MR. WOOTEN: He was the one that was the

6 baseball player, isn't he?

7 MR. GRANTLAND: Yes.

8 A: Baseball manager and player. They started it. He

9 lived on the first hole on the first green.

10 Q: That's here in Easley?

11 A: Greenville. Easley, yeah. Nice man. A really nice

12 man. They started the club.

13 Q: So you think Mr. Lambright might be bonded?

14 A: I think. I've never heard him talk about -- but,

15 you know, we don't talk that. We talk golf or, you

16 know, stuff like that. I mean, I don't talk

17 business with him or where he works or what he does.

18 He does odd jobs, that's why if I need a plumber

19 fix, he fixes it.

20 Q: And so he started, approximately 12 years ago?

21 A: A month or two afterwards. You can say 12. It was

22 right after I started.

23 Q: I guess as president you hired him to do certain

24 jobs around the HOA?

25 A: Any of the other 17 people would call me, and that's

1 what happened in this case. And if you ask, I'll
2 tell you that's what happened in this case, I got a
3 call.

4 Q. And I'll get to that. Before this accident, what
5 kind of jobs did Mr. Lambright do?

6 A. Everything in the book. You name it, he can do it.

7 Q. And I guess you call him out there, he'd do it,
8 you'd help him or supervise him?

9 A. I wouldn't do nothing. I wouldn't even watch him.
10 I'd say put this in and I'd leave, or fix this water
11 heater and I'd leave, or fix this roof.

12 Q. When he was done, would you check in on him?

13 A. He would give the invoice to the treasurer. She
14 would not pay him until I signed it. She'd bring it
15 to me. She's 89 years old. She'd bring it to me,
16 she'd sign it. Now, if it was over \$1,000, I had to
17 approve it before he did the job. Like he wouldn't
18 do that whole paint job or a whole roof job because
19 he's not a roofer or painter.

20 Q. He would just do small jobs?

21 A. He's a handyman, I called him.

22 Q. Before the accident, Mr. Hobbs, had Mr. Lambright
23 ever cut any tree limbs for you?

24 A. Maybe just some small ones that were hanging down
25 and hit you in the head when the lawnmower guy --

1 A. See, we have tree limbs that hang over the buildings
2 as they grow and the people will start calling me
3 saying they're going to fall on my roof and knock a
4 hole in it. You know, 89-year-olds don't take much
5 patience.

6 Q. No.

7 A. And they call on anything.

8 Q. Who was the contractor in the bucket truck that cut
9 limbs three months before?

10 A. I knew you was going to ask that. He's out of
11 Liberty. I can't remember his name.

12 Q. But you hired him to cut some big limbs and he was
13 \$750?

14 A. He wanted 7-, 8-, 900, 10- -- thousand -- last time
15 it was 1100.

16 Q. He did the job, he just was expensive?

17 A. Yes, and he didn't do a good job. He didn't haul
18 off all of the broken limbs and stuff. And I made
19 Lee -- and Lee knew it. He picked up everything.
20 It looked like he'd run a vacuum cleaner back there
21 when he got through.

22 Q. How old is Lee?

23 A. He's probably -- I'm 70, so 74. He won't get on the
24 roof. He gets his son and son-in-law to get on the
25 roof.

1 when he mowed, he would say, "Could you get that
2 trimmed? It's hitting me in the head when I mow."
3 And I'd get Lee to come out and take five minutes
4 and mow, but no, no tree limbs. I hired a guy. The
5 reason -- I won't go into it. I hired a guy who
6 came out in a bucket and he ripped me off, and I
7 quit using him because he would trim one limb,
8 charge me \$750, and then I said the heck with this,
9 I'll get me somebody that will trim it. I'm not
10 supposed to tall, but you understand this tree was
11 already three-quarters broken, okay?

12 Q. Right.

13 A. It wasn't just like he cut the tree. He finished
14 based on a phone call.

15 Q. And I'll get to that. I want to make sure I
16 understand exactly what happened, Mr. Hobbs.

17 A. Yeah.

18 Q. So the bucket truck man, do you recall when --

19 A. I had him cut the big ones about three months ago.

20 Q. Three months before your accident or since the
21 accident?

22 A. Yeah, the big ones. No, three months before the
23 accident. The big ones that you had to have a
24 bucket.

25 Q. Right.

1 Q. Now, I'm going to maybe go back to Lee, but as the
2 president of the HOA, did you hire the guy who cut
3 your grass? Did you all have a grass cutter?

4 A. A standard guy who'd been cutting it 20-something
5 years.

6 Q. Who was that?

7 A. Daniel Lappin.

8 Q. Did you have anything to do with him; I mean, did
9 you supervise his work or pay?

10 A. Just paid him. He got paid once a month, and he
11 mowed once a week on Tuesdays, and that's the reason
12 he was out there and saw it all. He was mowing.
13 He'd just started.

14 Q. Just started on the day of the accident?

15 A. The day of the accident, right.

16 Q. How about painters, did you hire painters to do work
17 for the HOA?

18 A. I contracted. The bylaws require three quotes, and
19 I get the quotes. It ain't driven all by price, you
20 know. Depending on quality -- the looks and when
21 they drive up, if it's a beat up truck. You know,
22 I've been around thousands of people in 34 years, so
23 I can pick you out and -- if you're good enough to
24 do a job. So I picked them. Nobody else approved
25 them. I picked them.

1 A. Is don't show up, right.
 2 Q. I've been elected by not showing up, so I can
 3 appreciate that.
 4 Now, as president, was one of your duties
 5 hiring contractors to do work around the HOA?
 6 A. It was to go through me. I had to approve them. It
 7 could be recommended by secretary, treasurer, or
 8 anybody, but I had to approve them.
 9 Q. How about supervising contractors, did that go
 10 through you, as well?
 11 A. When you say supervising contractors, go to them if
 12 I wanted something?
 13 Q. Yes, sir.
 14 A. Yeah. If they missed a spot painting, I'd tell
 15 them. If they missed a shingle, I'd tell them,
 16 stuff like that, but I had a handyman that did a lot
 17 of our handy stuff.
 18 Q. Who was your handyman? Was that Lee Lambright?
 19 A. Lee Lambright.
 20 Q. Let me ask you about Lee. How long have you known
 21 Mr. Lambright?
 22 A. Thirty years.
 23 Q. Did you all work together at 3M?
 24 A. No, I met him at the golf course. I play golf with
 25 him.

1 Q. But, you know, like a licensed roofer or a licensed
 2 contractor?
 3 A. No, I don't know that.
 4 Q. How long has Mr. Lambright been the handyman for the
 5 --
 6 A. Twelve years.
 7 Q. Twelve years?
 8 A. The guy that they had was ripping them off.
 9 Q. Who was that?
 10 A. I don't know. He was charging them 125 and Lee
 11 charges 25. So as soon as I got president, I let
 12 him go because he was ripping them.
 13 Q. He was charging them 125 an hour?
 14 A. For the job. And a job would be \$25. You know, Lee
 15 would charge 25 and he would charge 125. I didn't
 16 get rid of him for the friend, I got rid of him for
 17 the economics of the homeowners association.
 18 Q. Right.
 19 A. I could care less who they had.
 20 Q. Did Lee charge 25 a job or 25 an hour, or do you
 21 know?
 22 A. Sometimes he didn't even charge me.
 23 Q. Did he live out there?
 24 A. No, he lives at Smithfield, but he didn't live at
 25 homeowners.

1 Q. I guess y'all are friends?
 2 A. Good Christian friends.
 3 Q. I assume you have his contact information. If we
 4 need to find him or talk to him, we could do that?
 5 A. Uh-huh. Raymond.
 6 Q. Raymond has it?
 7 A. I think Raymond has it.
 8 THE WITNESS: Don't you, Raymond?
 9 MR. WOOTEN: I think I probably do. I can get
 10 that for you, if you need that.
 11 MR. GRANTLAND: Okay.
 12 A. Yeah, if he don't, I can get it.
 13 Q. So he's been a friend for, approximately, 30 years?
 14 A. Uh-huh.
 15 Q. Do you know what his background is in, what work did
 16 he do before he was --
 17 A. He's from the Amish Country, so he's from up in --
 18 Q. He's from Pennsylvania?
 19 A. Yeah.
 20 Q. Now, does he have any licenses?
 21 A. That. I don't know. You mean, contract licenses?
 22 Q. Yes, sir, like a licensed plumber?
 23 A. Bonded and everything like that?
 24 Q. Yes, sir.
 25 A. He may be bonded.

1 Q. Is Smithfield here in Easley?
 2 A. Yes, it's part of the group. Barnes and Dart built
 3 it. Dart just died yesterday. Alvin Dark passed
 4 away yesterday. It's in the morning paper.
 5 MR. WOOTEN: He was the one that was the
 6 baseball player, isn't he?
 7 MR. GRANTLAND: Yes.
 8 A. Baseball manager and player. They started it. He
 9 lived on the first hole on the first green.
 10 Q. That's here in Easley?
 11 A. Greenville. Easley, yeah. Nice man. A really nice
 12 man. They started the club.
 13 Q. So you think Mr. Lambright might be bonded?
 14 A. I think. I've never heard him talk about -- but,
 15 you know, we don't talk that. We talk golf or, you
 16 know, stuff like that. I mean, I don't talk
 17 business with him or where he works or what he does.
 18 He does odd jobs, that's why if I need a plumber
 19 fix, he fixes it.
 20 Q. And so he started, approximately 12 years ago?
 21 A. A month or two afterwards. You can say 12. It was
 22 right after I started.
 23 Q. I guess as president you hired him to do certain
 24 jobs around the HOA?
 25 A. Any of the other 17 people would call me, and that's

Q. So if you brought Mr. Lambright out there and you're voluntarily standing where you're standing, what did the homeowners association do to cause the accident, if you know?

A. Other than the phone call Friday night and going down and seeing the limb hanging, and it was going to hit his house, and to protect his house from being hit, from the new section being hit by the tree limb. And we all agreed it would have it the -- quote, unquote from them, that it would have probably hit his sunroom, sundecks, and all that.

Q. Yes, sir. You know, your lawyer filed a complaint of your behalf against the homeowners association.

A. Yes.

Q. And I want to ask you some questions about that, maybe kind of zero in on what I'm getting at. And I can show you. I'm looking at the complaint and I'm sure you may have seen it.

A. Uh-huh.

Q. Paragraph 22, it talks about what the homeowners association -- well, I'll just read it. It says, Defendant, is the homeowners association. It says, Defendant, by and through the acts or omissions of Lambright for which the Defendant is liable, was negligent, reckless, willful, won't and careless and

Q. Would you expect the homeowners association to warn you of the hazard of Mr. Lambright's cutting the tree limb? Would you expect someone from the homeowners association to warn you of that?

A. Other than Benny who warned me to come cut the tree because it was going to fall if we didn't cut the tree, and when we went down there, we made the decision to cut the tree. They agreed. Benny obviously -- obviously, he'd already agreed. He was the one who called me.

Q. Sure. Right.

A. But between us three, we agreed that the limb was going to hit his house if we didn't get it cut. So we cut it.

Q. And you made the decision to use Lee, is that correct?

A. Yes. Well, I made -- Lee, because the tree was barely hanging, and the guy charges \$750 to come out in a bucket, and I wasn't paying \$750 to pay a guy in a bucket to come out and cut a limb.

Q. And you trusted Lee?

A. Yeah, he's done thousands of jobs for us.

Q. It also says, "In failing to take proper precautionary steps to keep persons like Tommy from encountering such a hazard."

grossly negligent in the following particulars.

Let me first stop there. You don't think Mr. Lambright did anything wrong?

A. No. Absolutely.

Q. But it says, "The Defendant was negligent in the following particulars... In failing to keep Tommy and other persons from coming near the area where the tree cutting was occurring."

Now, you stood where you stood on your own, is that right?

A. On my own, yes.

Q. No one told you to stand there, is that right?

A. Right.

Q. Then B, "In failing to warn Tommy or other persons of a hazard of tree cutting." I mean, you were aware of that?

A. Yeah, but he warned me, all of us, and looked, he says, and warned us. And Daniel will tell you that he warned us to get out of the way.

Q. Right.

A. To make sure we were all out of the way.

Q. And you thought you were out of the way?

A. We thought we were out of the way. And they said he turned around on the ladder and looked to see if we were all out of the way before he made the cut.

What should the association have done differently, do you know?

A. What should the association have done differently?

Q. Yes, sir.

A. Other than warned us? Well, they warned us to get out of the way. We got out of the way as far as we could get, as far as the association being in the way of the way cutting the tree. Again, we had no idea the tree was falling this way and nobody can do that.

Q. And no one expected the tree to fall that way?

A. No.

Q. You were the only person out there on behalf of the association, is that right?

A. I'm the president. I was repressing their -- I don't get a penny; not a penny.

Q. Yes, sir.

A. Daniel Lappin is the only one who gets paid.

Q. Yes, sir. And did Lee get paid for this?

A. No.

Q. He didn't take any money?

A. The president don't get paid.

Q. No, I'm talking about did Lee get paid for cutting that limb?

A. Well, he didn't charge us because all this happened.

Q. Right.

A. He took Mary to the hospital in his truck, but other than that, no.

Q. Is there anything that you can think of that the homeowners association, who you're suing, is there anything that you can think of that they should have done differently to have kept this accident from happening?

A. Well, there's nothing -- I couldn't go any farther.

Q. Yes, sir.

A. I would say no, other than we had to get the tree cut because it was going to fall on his house if we didn't, that would be the only thing right now that I could say would be a reasoning that they would have. The person living up where I live, next door to me, is not going to see this tree limb down here. This is the end tree limb. Nobody else is going to see this but Benny. The lady next door, she works, she's not going to see it. So nobody is going to see the tree limb there but Benny. So being president, he calls me on a Friday, all right?

Q. Right.

A. Which would be natural. I'd call you if you was the president to tell you I've got a limb fixing to hit my house.

A. 10:30 that night. She's laying next to me in a cot and I ask where I am and what I'm doing here. For about 400 times I'd asked that day, where am I. And I'm still having trouble remembering dates, days. I can't even remember your name right now, or hers.

Q. John.

A. Okay.

Q. Sandy.

A. I can't remember.

Q. Right.

A. I've got golfers I've known 40 years. I'll walk up and they'll see the look in my face. They laugh and say, "You can't remember me, can you?" And I say, "No, don't tell me." And they start laughing and say, "Wait. I'll wait and you guess." In about two minutes, I'll remember Daniel or Dan or whatever his name is.

Q. Yes, sir.

A. But I have headaches. Balance is awful. I fell about ten times. I've had about three, four, five concussions. I fell off a porch. I fell in my own bedroom and hit my bedpost and caused seven staples. I've had 40-something in my head. I'm hurt for life.

Q. Yes, sir.

Q. Yes, sir.

A. Yeah. But I can't think of any -- you know, it was a bad storm.

Q. Yes, sir. And I don't want to put words in your mouth, I just want to make sure I understand. The main reason you're suing the association is because you were out there as the president and you got hit by the tree limb, is that correct?

A. The one reason, yes.

Q. I mean, had you not been president, you would not have been out there?

A. I had not been president, I don't know. I don't know. I can't answer that.

Q. You got Lee out there. You picked Lee to do it.

A. Yeah, I picked Lee.

Q. And you voluntarily stood where you stood?

A. I volunteered, to my knowledge, of standing where I did. And I don't remember anything. I could have stood down here, you know, but I did. Lee made a statement I think, according to him, to tell us to get out of the way, to make sure we were out of the way, and he told us that. Now I'm quoting him. I don't know that for a fact because I don't remember.

Q. The next thing you remember, I guess, you were in the hospital?

A. And I'll tell anybody that.

Q. Right.

A. I'll never be the same.

Q. Yes, sir.

A. You, her. You can put whatever you want on that pad. I'll never be the same. Now I'm 70 years old. I don't expect to be running around the block. I moved here to play golf. I moved into the townhouse to play golf and I'm not getting to do it. It's been two years since I got to play.

Q. You haven't played no golf since?

A. No golf. I gave up my presidency, gave up president of the golf association. I'm fixing to have to give up the president of the church because I can't sign checks. I can't even get in my car and go. I can't drive. So do you blame me for doing what I'm doing when my life ended?

Q. Yes, sir. So have you surrendered your license?

A. No, but they're wanting me to. She drives.

Q. When is your license --

A. I haven't lost my license. She does all the driving.

Q. Have you driven since the accident?

A. To McDonald's.

Q. Yes, sir.

1. remember helping him put it in the truck, I don't
2. remember helping him tie it off. I don't remember
3. nothing. She says we took the little girl to school
4. first day. I don't remember that. I don't even
5. remember getting out of bed.

6. Q. But you don't think Lee is responsible because he
7. had no control over where the limb was going to
8. fall?

9. A. No. How the hell do you know that? I mean, that's
10. a stupid question to ask, how do you know which way
11. a limb is going to fall... Do tree people know which
12. way? Go ask the guys in Liberty and ask him if he
13. knows which way a tree is going to fall when he cuts
14. it.

15. Q. Yes, sir.

16. A. Or ask anybody in this thing. You don't know where
17. it's going to fall.

18. Q. Yes, sir. In hindsight, Mr. Hobbs, do you think you
19. have any responsibility?

20. A. No, not absolutely. If you're asking me if I was
21. representing the president of the association, yeah.

22. Q. Yes, sir.

23. A. I walked down to Lee, with him, to make sure he
24. remembered and knew which one to cut and that I
25. wanted it hauled off, cut up into lengths and hauled

1. fix the creek.

2. Q. Yes, sir. And I apologize if it's a stupid question
3. or a hard question, but I need to ask you, why are
4. you suing the homeowner's association?

5. A. Because I think that it's their fault, and my
6. medical bills and my inconvenience that I've had for
7. two years. I've had four pins and two plates put in
8. my head. I've had headaches for a year every dang
9. day, every day for a year. I've took 2,000
10. Ibuprofen since this happened. I can't do nothing.
11. I'm in the bed. I'm about to fall out of this chair
12. now. I'm weak.

13. Q. Yes, sir.

14. A. And the inconvenience to my wife is, she gets up,
15. she has to hold me to use the bathroom. It's not
16. fair to say Tommy Hobbs is at fault because he was
17. standing where he was and representing what his
18. responsibilities are as president of the association
19. and all to show Lee which tree limb to cut.

20. Q. Yes, sir. What do you believe the homeowners
21. association did wrong or what do you believe the
22. homeowners association did to cause your accident?

23. A. What did the homeowners do to cause my accident?

24. Q. Yes.

25. A. To fix the tree limb in case it fell and hit the

1. off. This city will pick them up if you put them
2. out in the front.

3. Q. Yes, sir.

4. A. I said, "Lee, I want them hauled out on the front.
5. I want them picked up." He said, "I'll do all
6. that." That's what I mean by vacuum cleaning and
7. things. He picked every limb up.

8. Q. Yes, sir. He made it look like it didn't fall at
9. all?

10. A. You didn't even know there was a limb there.

11. Q. Yes, sir. You stood where you stood voluntarily,
12. didn't you?

13. A. Yeah. I could have stood back to my house, you
14. know, and got back into bed with my wife, but I
15. didn't, you know.

16. Q. Yes, sir. I mean, you picked where you were
17. standing?

18. A. I picked where I was standing. I can't go this way,
19. I'd fall in the creek. So you can't go anywhere
20. down that way or you're in the creek. If you've
21. been out there, and it looks like you have, you're
22. going to fall in the creek. You can't see it
23. because it's --

24. Q. And I don't have a picture of the creek.

25. A. In fact, we're in a thing with the city right now to

1. house, and it would have hit the house.

2. Q. Yes, sir.

3. A. It was broke that bad that it was leaning that far.
4. It would have hit this brand new house here, okay.

5. Q. Yes, sir. Well, so do you believe the homeowners
6. association did anything wrong?

7. A. The association did anything wrong?

8. Q. Yes, sir.

9. A. The good Lord broke the limb, I didn't do it, you
10. know. The good Lord broke the limb when he had the
11. storm Friday night or Thursday night. Friday day.

12. Q. Yes, sir.

13. A. But no, I don't believe that they actually went down
14. with a chainsaw and started chopping on it, you
15. know.

16. Q. Yes, sir. You tell me if you disagree. You were
17. acting on behalf of the association when you brought
18. Mr. Lambright out there?

19. A. Yes.

20. Q. And you were acting on behalf of the association
21. when you were standing there?

22. A. Yes.

23. Q. If you were not president, you'd have been home or
24. on the golf course?

25. A. Yes.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF PICKENS) CASE NO. 2014-CP-39-00613

COPY

CHARLES THOMAS HOBBS AND
MARY HOBBS,

PLAINTIFFS,

vs.

FAIRWAY OAKS HOMEOWNERS
ASSOCIATION,

DEFENDANT.

DEPOSITION

OF

BENNY ROPER

Deposition on the oral examination of BENNY ROPER, reported by Andrea Shorb, Verbatim Court Reporter and Notary Public for the State of South Carolina; said deposition taken pursuant to notice and in accordance with the South Carolina Rules of Civil Procedure at the law offices of Smith, Jordan, Lavery & Lee, 1810 East Main Street, Easley, South Carolina on Wednesday, November 19th, 2014, commencing at 11:20 a.m.

1 who hired Lambright; is that right?

2 A. That's correct.

3 Q. Do you know if Mr. Lambright had any license or
4 insurance or if his work was bonded?

5 A. None, to my knowledge.

6 Q. Okay. Is Mr. Lambright a personal friend of Mr.
7 Hobbs?

8 A. Yes, sir.

9 Q. And do you know why Mr. Lambright was hired
10 instead of a professional tree trimmer?

11 A. No, sir. I do not.

12 Q. Okay.

13 A. I was told it would be Mr. Brilar that was a
14 professional tree trimmer when I told him I
15 needed some limbs removed. That's -- they told
16 me that's -- Tommy told me he'd get Mr. Brilar.

17 Q. When did Mr. Hobbs promise you that a
18 professional tree trimmer would be hired?

19 A. When I told him at the time, that I told him
20 those limbs needed trimmed to keep them off my
21 deck.

22 Q. Do you know what month that was?

23 A. It was two days before the accident.

24 Q. Okay. So two days before this accident Mr. Hobbs
25 told you that he would hire a professional tree

1 trimmer to take care of the branch?

2 A. Yes, sir.

3 Q. And when you showed up the day the branch was
4 being removed, it was Mr. Hobbs and Mr. Lambright
5 removing the branch?

6 A. Yes, sir.

7 Q. Okay. And do you know why the professional tree
8 trimmer was not hired?

9 A. No, sir; I don't.

10 Q. Okay.

11 A. I do know that this past year Mr. Brilar, which
12 is a professional tree trimmer, was hired to
13 remove some dead limbs; and this was in June or
14 May, late May or early June. And he came and
15 started work and Ms. Massingale, which was the
16 treasurer, got mad because he cut a tree limb
17 that was green behind her place and fired him.
18 Paid him the full amount and run him off and paid
19 him \$1125.

20 Q. Okay. So Mr. Brilar had showed up on the
21 property to remove limbs in 2014.

22 A. Yes, sir.

23 Q. But in 2012, the time of this accident, Mr. Hobbs
24 and Lambright were the two folks removing the
25 branch; is that right?

1 Q. Was within 10 feet of?

2 A. Mr. Hobbs.

3 Q. Mr. Hobbs, okay.

4 A. I think he'd been closer than that, but --

5 Q. So there was about 10 feet between Lappin and
6 Hobbs; is that right?

7 A. Yeah, yeah.

8 Q. Okay.

9 A. Yeah.

10 Q. And did you ever -- when Mr. Lambright was up on
11 top of the ladder, did he have a chainsaw?

12 A. Yes, sir.

13 Q. And was that chainsaw running so he was cutting
14 limbs down?

15 A. Yes, sir.

16 Q. And did you see Mr. Hobbs walk underneath the
17 branches?

18 A. Mr. Hobbs didn't walk underneath them. He was
19 standing --

20 Q. Okay.

21 A. -- right there.

22 Q. Did you see him standing underneath the branches?

23 A. Yes, sir.

24 Q. As Lambright was cutting them?

25 A. Yes, sir.

- 1 A. Better areas, yes, sir.
- 2 Q. Safer areas?
- 3 A. Yes, sir.
- 4 Q. Could he have been closer to your condo or down
- 5 in the meadow or closer to the --
- 6 A. He couldn't have got no closer to the condo.
- 7 Q. Okay.
- 8 A. Now, he could have been stood out here a little
- 9 further or stood over here or stood back here;
- 10 but, you know, he was in direct line of fire.
- 11 Q. So do you think that Mr. Hobbs was, in your
- 12 words, in the direct line of fire underneath the
- 13 branch?
- 14 A. Yes, sir.
- 15 Q. And you don't think that was a smart place to
- 16 stand?
- 17 A. No, sir.
- 18 Q. And there were safer places that he could have
- 19 been standing?
- 20 A. Yes, sir.
- 21 Q. Okay. Let me ask you this; who do you think is
- 22 responsible for this accident?
- 23 A. Mr. Lambright, but I think -- well, I think
- 24 Tommy's in the wrong place at the wrong time, and
- 25 Mr. Lambright is the one that cut the limb.

1 going on? What did you see?

2 A. I seen Mr. Lambright on the ladder, cutting limbs
3 up here. Tommy, he was down here and then he was
4 over there. I'm thinking that they threw a rope
5 with a drop tied to it around that limb to pull
6 down where they'd know which one to cut. But,
7 you know, I wasn't expecting this to happen, and
8 I wasn't really paying attention to what was
9 happening. At this time I -- when the accident
10 actually happened, Mr. Lappin had just got there;
11 and he was talking to Tommy. And I was right
12 here, and I just happened to be watching when Mr.
13 Lambright cut that limb that was right here. I'm
14 going to mark this limb. There was another limb
15 under it that had been cut, that hadn't fell to
16 the ground. It still liked this much being cut
17 and hanging down, and you can see that clearly if
18 you look at those limbs that were cut. But when
19 he cut this bigger limb right here on top, it
20 fell down on the smaller limb that hadn't fell
21 and both limbs at that time came down; and Tommy
22 was under them when they came down. I seen
23 Lappin run over there to Tommy, and I knew
24 something was wrong. I came out the front door
25 and came around the side of my house. And at

- 1 A. I don't know that Mr. Hobbs hired anybody.
- 2 Q. Okay. That's not who showed up to remove this
- 3 limb; is that right?
- 4 A. No, sir.
- 5 Q. Okay. And who showed up to remove this limb?
- 6 A. Mr. Hobbs and Mr. Lambright.
- 7 Q. Okay. And so instead of the professional tree
- 8 trimmer, you saw Mr. Hobbs and Mr. Lambright
- 9 removing the limbs that day?
- 10 A. Yes, sir.
- 11 Q. Okay. Were you helping them too or no?
- 12 A. No, sir.
- 13 Q. Were you doing your own business --
- 14 A. I was screening my porch on the third deck.
- 15 Q. Okay. And you --
- 16 A. Which was in line with limbs that were being cut,
- 17 hanging over the first floor deck.
- 18 Q. And you had a good eyesight of what was happening
- 19 that day?
- 20 A. Yes, sir.
- 21 Q. And did you actually watch this accident unfold?
- 22 A. Yes, sir.
- 23 Q. And you don't have any doubt of how it unfolded;
- 24 is that right?
- 25 A. There's no doubt in my mind.

- 1 A. Yes, sir.
- 2 Q. And would you agree that Mr. Hobbs has some
3 responsibility for his injuries?
- 4 A. Yes, sir.
- 5 Q. Okay. Are you aware of anyone who forced or made
6 Mr. Hobbs stand where he was standing?
- 7 A. Pardon me.
- 8 Q. Was anyone out there forcing Mr. Hobbs to stand
9 where he was standing?
- 10 A. No, sir.
- 11 Q. Did anyone tell him where he had to stand?
- 12 A. No, sir.
- 13 Q. Do you believe that he stood where he was
14 standing on his own free choice?
- 15 A. Yes, sir.
- 16 Q. Okay. And let's talk about the HOA. Do you
17 think the HOA did anything wrong to cause Mr.
18 Hobbs' injury?
- 19 A. No, sir.
- 20 Q. And would it be your testimony that this
21 accident, responsibility for this accident, rests
22 with Mr. Lambright and with Mr. Hobbs?
- 23 A. Yes, sir.
- 24 Q. And it does not rest with the HOA?
- 25 A. No, sir.

EXHIBIT C

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF PICKENS) CASE NO. 2014-CP-39-00613

COPY

CHARLES THOMAS HOBBS AND	)	
MARY HOBBS,	)	
	)	DEPOSITION
PLAINTIFFS,	)	
	)	OF
vs.	)	
	)	LEE LAMBRIGHT
FAIRWAY OAKS HOMEOWNERS	)	
ASSOCIATION,	)	
	)	
DEFENDANT.	)	

Deposition on the oral examination of LEE LAMBRIGHT, reported by Andrea Shorb, Verbatim Court Reporter and Notary Public for the State of South Carolina; said deposition taken pursuant to notice and in accordance with the South Carolina Rules of Civil Procedure at the law offices of Smith, Jordan, Lavery & Lee, 1810 East Main Street, Easley, South Carolina on Wednesday, November 19th, 2014, commencing at 1:03 p.m.

1 Tommy was always in charge of a -- or was for
2 years in charge of the senior's group.

3 Q. Okay.

4 A. So he'd always go off in the last group. Well,
5 sometimes, on occasion, I'd be paired with the
6 last group; but normally I'd be in one of the
7 first groups, so --

8 Q. Okay. So you golfed with him throughout the year
9 on and off, and you'd describe your relationship
10 as friends; right?

11 A. Yeah, sure.

12 Q. And do you keep up with Tommy on a social basis
13 before the accident and after the accident?

14 A. Yeah; yes.

15 Q. And you know his wife and you know where he
16 lives?

17 A. Correct.

18 Q. And had his phone number?

19 A. Yeah.

20 Q. And you check in on him regularly?

21 A. Yes.

22 Q. Okay. And so, tell me how you became the
23 contractor for the HOA. I guess you were working
24 for Tommy and he said --

25 A. I'm not a contractor.

1 Q. Okay.

2 A. I'm just a neighborhood friend, and I do a lot of
3 little projects for people; but I don't have a
4 business, so to speak or --

5 Q. Okay. So you're not a contractor and you're more
6 of a neighborhood friend?

7 A. Yeah.

8 Q. And you're a friend of Tommy Hobbs; is that
9 right?

10 A. Right.

11 Q. And he said would you come help us out and do
12 some projects for the HOA?

13 A. Yeah.

14 Q. And that's how you began working at the HOA
15 property?

16 A. Right.

17 Q. And that work continued for seven or eight years?

18 A. Yes, probably so.

19 Q. Okay. Do you have a business that's
20 incorporated?

21 A. No, no.

22 Q. Are you a licensed contractor?

23 A. No.

24 Q. Are you bonded?

25 A. No.

1 Q. Do you have worker's comp insurance?

2 A. No.

3 Q. Do you have any employees?

4 A. No.

5 Q. Do you have other clients?

6 A. Off and on I do. Yes, I guess you would say.

7 Q. Okay. And how were you selected to perform the
8 handyman work? Was it an election by the Board;
9 or was it just a question Tommy asked you and you
10 said yes, I'll do it for you?

11 A. Yeah, he just -- he just asked me.

12 Q. Okay. And each job that you performed -- well,
13 let me ask you this. Over those seven or eight
14 years, how many projects do you think you
15 performed on the property?

16 A. A couple of dozen, anyway. A lot of them were
17 inside work that the residents themselves asked
18 me to do.

19 Q. Okay. So also the residents would hire you in
20 their own capacity and not just --

21 A. Right.

22 Q. -- through the HOA?

23 A. Right.

24 Q. And how many times do you think over the last
25 eight years you went to that property to perform

1 work?

2 A. Probably a hundred times, if you add the days
3 together that I'd be doing a painting project or
4 a ceramic tile or something like that.

5 Q. So it seems pretty frequent. I mean, you would
6 do --

7 A. Yeah.

8 Q. -- it on a regular basis?

9 A. Yeah.

10 Q. And what about for the HOA? How many of those
11 projects would have been for the HOA?

12 A. Maybe, maybe a third.

13 Q. So more than thirty projects, at least, you
14 performed for the HOA over eight years; is that
15 right?

16 A. Right.

17 Q. And did Tommy Hobbs hire you for each one of
18 those?

19 A. Yeah, pretty -- pretty much, he and the
20 treasurer.

21 Q. When you were asked to perform a new project, was
22 it Tommy Hobbs who asked you to do the work?

23 A. Generally.

24 Q. Okay.

25 A. Yeah.

1 Q. And was it the treasurer who gave you a check?

2 A. Yeah.

3 Q. Okay. How long have you been doing work as a
4 handyman? Is that how you describe yourself, a
5 handyman?

6 A. Yeah, I guess. I don't know. We used to have
7 some apartment buildings in Indiana and I -- and,
8 of course, I grew up on a farm, and we just did a
9 lot of our work. And I've been doing stuff like
10 that for many years on the side.

11 Q. When you were a sports writer, a sports editor,
12 would you do handy work on the side for money?

13 A. I mainly did it just for myself.

14 Q. And did you only begin to get paid for your work
15 as a handyman once you came to South Carolina?

16 A. Yeah.

17 Q. Okay. So it sounds like you've had about
18 fourteen years of paid work as a handyman, but
19 you describe yourself more as a neighborhood
20 friend than a professional contractor; is that
21 right?

22 A. Right; yeah.

23 Q. Okay. What kind of projects would you be hired
24 for?

25 A. Trim work, painting, ceramic tile, plumbing

1 leaks, repairs.

2 Q. What about --

3 A. Door problems.

4 Q. What about tree limbs? Have you ever been hired
5 before to cut tree limbs?

6 A. I don't believe I had.

7 Q. So the time that you cut tree limbs in August of
8 2012, when the branch fell on Mr. Hobbs, was that
9 the first time you've ever been hired to cut tree
10 limbs?

11 A. I believe it was. I had cut a lot of them myself
12 for my own properties, but --

13 Q. Did Mr. Hobbs know that, that you had never been
14 paid to cut tree limbs before?

15 A. I don't know. We didn't discuss that. I, of
16 course, have told him that, you know, I have a
17 saw and --

18 Q. So when he approached you with the tree-limb
19 project, how did that conversation go?

20 A. He -- he said they had this big limb back there
21 behind the house where Benny lives, and it was
22 getting close to it and wanted to know if I could
23 cut it off. And I said, "Well, I can do it, but
24 I have to get a guy to help me with the ladder.
25 It would take a big ladder to get up there." And

1 A. He might have. I couldn't say yes or no on that
2 one.

3 Q. Okay. And you get to the property and you have
4 the ladder. Is it in your truck? Do you have a
5 truck?

6 A. Yeah.

7 Q. Okay. And does Mr. Hobbs help you get the ladder
8 out of your truck?

9 A. And again, I'm not sure; but I would guess he
10 did.

11 Q. And you two walked the ladder down together to
12 the grassy area where the limb was?

13 A. Yeah, probably so.

14 Q. Okay. And you testified that Mr. Hobbs helped
15 you set the ladder up?

16 A. Correct. That I do know for sure.

17 Q. Okay. And describe that for me. How did that
18 happen?

19 A. We stretched out the ladder to reach the limb and
20 just --

21 Q. Was it an extension ladder?

22 A. Yeah.

23 Q. And did it require two people to use the rope, to
24 pull the ladder up?

25 A. No.

- 1 Q. Okay.
- 2 A. We just -- we didn't have to put it up very high,
3 so we got it up high enough to reach the limb;
4 and one of us has to keep the end of the ladder
5 down and the other can walk the ladder up, you
6 know.
- 7 Q. Which one of you two kept the ladder down at the
8 bottom?
- 9 A. It was probably Tommy.
- 10 Q. And do you think that you climbed the ladder?
- 11 A. Not to get it set up.
- 12 Q. Okay.
- 13 A. You just -- you get under the ladder and walk it
14 up with your hands as you straighten it up, you
15 know.
- 16 Q. Okay. And that would have been what Tommy had
17 done; is that right?
- 18 A. He would have -- he would have held the end of
19 the ladder down, I believe.
- 20 Q. Okay. And after the ladder gets set up, what
21 happens next?
- 22 A. And I go up and start cutting the tree.
- 23 Q. All right.
- 24 A. The limb.
- 25 Q. Did Tommy ever check the ladder to make sure it

1 Q. And then like a long arch, it tipped over?

2 A. Correct.

3 Q. And that's when the branch fell and hit Tommy
4 Hobbs in the head?

5 A. Yeah. That splintered end hit him on the top of
6 the head.

7 Q. And was it the end that was attached to the tree
8 trunk?

9 A. Yeah.

10 Q. Okay. So it sort of did a somersault when you
11 pushed it and hit him on top of the head; is that
12 right?

13 A. Yeah.

14 Q. Okay.

15 A. Yeah. It just sort of flipped on out.

16 Q. At the time of the accident, when you pushed the
17 branch forward and it hit Mr. Hobbs, how far
18 apart was Tommy Hobbs and Daniel Lappin standing?

19 A. I would guess at least 20 feet.

20 Q. Okay. So there was 20 feet between Lappin and
21 Hobbs. Could you see where they were standing
22 through all the branches when you pushed the tree
23 forward?

24 A. Not really, but --

25 Q. Were the tree branches and leaves blocking your

1 A. Right.

2 Q. Okay. And you had your own little side business,
3 and they would hire you for individual projects;
4 is that right?

5 A. Correct.

6 Q. Do you think that that would make you an
7 independent contractor in this case?

8 A. Probably so.

9 Q. Okay. What about Mr. Hobbs? Did he have any
10 experience in cutting tree limbs, that you know
11 of?

12 A. I doubt it. I don't know, maybe some small-type
13 projects over the years but --

14 Q. Okay. And before this incident and before this
15 tree-limb issue, had there ever been problems
16 with your work on the property?

17 A. Not that I'm aware of.

18 Q. Okay. And just so we're -- just to be clear, Mr.
19 Hobbs is the one who hired you for this work; is
20 that right?

21 A. I would say so; yeah.

22 Q. Okay. And he's the one who asked you to cut this
23 tree limb; is that right?

24 A. Yeah.

25 Q. And he did so probably because of your price and

1 vision?

2 A. Pretty much.

3 Q. Okay.

4 A. Pretty much, it was so thick. It was just like
5 the thickness was like this tree, this picture
6 right in here; and you can see how thick that is.

7 Q. And you're indicating the leaves on the main
8 tree, on the side of the photograph; right? I'm
9 sorry.

10 A. Yeah.

11 Q. The thickness you're referring to were the leaves
12 up in the tree --

13 A. Yeah.

14 Q. -- on the side of the photograph?

15 A. Yeah.

16 Q. And they were so thick that you couldn't see
17 through them; is that right?

18 A. Well, I wouldn't honestly say that I couldn't see
19 through them; but I guess at the point in time I
20 didn't look to see, didn't really look to see if
21 any of those guys had moved up or moved over
22 there.

23 Q. Okay. So you walked underneath the --

24 A. That's right.

25 Q. -- beside the tree, beside the branch, and you

1 Q. And how would it be done differently?

2 A. I'd just make more sure, I guess, that
3 everybody's, you know, in a safe spot.

4 Q. Okay. Do you think Mr. Hobbs has some
5 responsibility for this accident?

6 A. Oh, of course.

7 Q. And what do you mean by that?

8 A. Well, he wouldn't have had to be there to begin
9 with. You know, it was his choice of being out
10 there and --

11 Q. And he knew that the limb was coming down; is
12 that correct?

13 A. Sure; yeah.

14 Q. And did he choose where to stand at the time of
15 the accident? No one forced him to stand where
16 he was?

17 A. No.

18 Q. Okay.

19 A. No.

20 Q. Do you think he could have avoided the accident
21 if he stood in a safer place?

22 A. Sure; yes. I mean, this -- this thing is about
23 this wide; and it was a wide, open area that it
24 could have come down a thousand different little
25 places and not hit anybody. It just -- just an

1 act of God, I guess, that it came down right in a
2 specific place. And why he was over there, like
3 I say, I don't know. I don't know.

4 Q. Okay. Do you think that he was there in his
5 capacity as the president of the HOA?

6 A. Well, probably. Yeah; sure.

7 Q. Okay. Do you believe that the HOA did anything
8 wrong to cause this accident?

9 A. If they did, I don't know what it would be.

10 Q. Can you name anything that the HOA did wrong to
11 cause Mr. Hobbs' injury?

12 A. No, no.

13 Q. And, of course, you were there that day and you
14 know exactly how this happened and you know how
15 you were hired and the work you do and how Mr.
16 Hobbs was injured; is that right?

17 A. Correct.

18 Q. Can you name anything that the HOA did wrong to
19 cause Mr. Hobbs' injury?

20 A. No.

21 Q. Do you think that the HOA is responsible for Mr.
22 Hobbs' injury in any way?

23 A. I have no idea.

24 Q. Okay. I'm going to show you a document that Mr.
25 Hobbs' attorney filed to initiate this suit.

1 responsibility do you think it was to keep Tommy
2 Hobbs from coming where the tree cutting was
3 occurring?

4 A. It was probably as much his as anybody's, in my
5 opinion, I guess, but --

6 Q. Okay. So you think it was Tommy's responsibility
7 to avoid coming where the cutting was occurring?

8 A. Well, when you got -- you got three or four guys
9 out there and adults, you know, I think it's
10 pretty much everybody's responsibility.

11 Q. Okay.

12 A. Make this happen in a safe kind of way.

13 Q. Okay. Do you think it was also your
14 responsibility to keep Tommy from coming where
15 the cutting was occurring?

16 A. Well, I was part of it, no doubt about it; yeah.

17 Q. Was that a "yes"?

18 A. To say totally, no. But I should have done my
19 part; yes.

20 Q. Okay. Do you think that -- whose responsibility
21 do you think it was that Tommy was allegedly not
22 warned of the dangers of tree cutting?

23 A. I'm sure you're pointing at me on that; but
24 again, I would say Tommy didn't have to be out
25 there.

1 Q. Okay.

2 A. He was out there by his own choice.

3 Q. Okay.

4 A. His own choosing.

5 Q. Would you agree that the warning about the
6 dangers of tree cutting would be either your or
7 Mr. Hobbs' responsibility?

8 A. Well, yeah. I would guess so; yeah.

9 Q. Okay. And what about the line where it said
10 proper precautionary steps, proper safety gear,
11 and proper degree of care and caution were not
12 used? Whose responsibility do you think those
13 were?

14 A. That's probably true, but you're not dealing with
15 a professional tree cutter, you know. And I was
16 just asked to cut the limb; and knowing that this
17 type of thing can be very dangerous and so, you
18 know, I thought we were using precautionary means
19 and --

20 Q. And whose responsibility do you think those
21 precautionary and safety measures were?

22 A. Well, probably mine.

23 Q. And in any of those six allegations that you
24 read, did you see anything that the HOA did
25 wrong?

1 A. If they did anything wrong, is that they asked me
2 to do it; yes.

3 Q. Okay. And let me just see if I understand you
4 correctly. If the HOA did anything wrong, it's
5 your opinion it's in hiring a non-professional
6 tree cutter?

7 A. Probably so; yeah.

8 Q. And who at the HOA hired you as the tree cutter?

9 A. Tommy would have been the one that -- would have
10 hired me, I guess.

11 Q. So if the HOA did anything wrong, do you think
12 that that responsibility lies with Tommy?

13 A. He was the president and, you know, he's the one.
14 He's the one that talked to me about doing it;
15 yeah.

16 Q. Is that a "yes"?

17 A. What was the question again?

18 Q. If the HOA did anything wrong, then do you think
19 that it was Tommy's responsibility?

20 A. Probably so; and I guess that would be a yes.

21 Q. Okay. Is there anything the HOA, and
22 particularly the other members of the HOA, could
23 have done differently that would have prevented
24 Tommy from being injured?

25 A. Well, if they had hired a professional tree

1 cutter, maybe. And, I mean, he could have got
2 hurt then too, but -- if he had gone out there.

3 Q. And do you think that it's the HOA's fault that
4 Mr. Hobbs was injured?

5 A. I have no opinion on that. I don't know.

6 Q. Okay. Is there anything that the rest of the
7 HOA, besides Tommy Hobbs, could have done
8 differently that would have kept Mr. Hobbs from
9 being injured that day?

10 A. Hired a professional tree, hired somebody else,
11 perhaps, and not -- and not had him go out there.

12 Q. Okay. Did the HOA, to your knowledge, require
13 Mr. Hobbs to go out there that day; or was it his
14 choice?

15 A. It was his choice. As far as I know, it was his
16 choice.

17 Q. And as far as you know, it was his choice where
18 to stand and whether or not to help you; is that
19 right?

20 A. Pretty much; yeah.

21 Q. Okay. Do you think it's the HOA's fault in any
22 way that Mr. Hobbs stood near the tree when the
23 limb fell and hit him on the head?

24 A. I don't see how it would have been.

25 Q. And you would agree you testified earlier that if

EXHIBIT D

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF PICKENS) CASE NO. 2014-CP-39-00613

COPY

CHARLES THOMAS HOBBS AND
MARY HOBBS,

PLAINTIFFS,

vs.

FAIRWAY OAKS HOMEOWNERS
ASSOCIATION,

DEFENDANT.

DEPOSITION

OF

DAVID LAPPIN

Deposition on the oral examination of DAVID LAPPIN, reported by Andrea Shorb, Verbatim Court Reporter and Notary Public for the State of South Carolina; said deposition taken pursuant to notice and in accordance with the South Carolina Rules of Civil Procedure at the law offices of Smith, Jordan, Lavery & Lee, 1810 East Main Street, Easley, South Carolina on Wednesday, November 19th, 2014, scheduled for 10:00 a.m. and commencing at 10:02 a.m.

1 tree; is that right?

2 A. Yes.

3 Q. Okay. And were you facing the tree also?

4 A. Yes.

5 Q. And were you to Mr. Hobbs left?

6 A. Yes.

7 Q. And he was to your right?

8 A. Yes.

9 Q. And what was the distance between you two?

10 A. Maybe 8 or 10 feet.

11 Q. Okay. So he was about 8 or 10 feet to your
12 right?

13 A. Yes.

14 Q. Okay. And what was the distance between Mr.
15 Hobbs and the tree, do you think?

16 A. Probably 15 feet.

17 Q. Okay. Was Mr. Hobbs standing -- excuse me -- was
18 Mr. Hobbs standing as far away as possible from
19 the tree?

20 A. We were both dragging limbs at the time.

21 Q. Okay.

22 A. And that's where we -- because we were both
23 dragging, and that's where we were when the limb
24 fell.

25 Q. Okay. And it looks like there was some distance

1 between Mr. Hobbs and the condo. Is that right?

2 A. Yes.

3 Q. Okay. What do you think that distance was?

4 A. Ten feet, maybe.

5 Q. Okay. So he was not standing all the way against
6 the condo when the limb fell and hit him; is that
7 right?

8 A. No.

9 Q. Okay. Do you agree he could have been standing
10 close to the condo?

11 A. Well, we were -- we were dragging limbs. I mean
12 at that time he wasn't.

13 Q. Okay, okay. And it looks like there -- let me
14 strike that question. Okay. So I understand
15 you're standing about 5 to 8 feet beside Mr.
16 Hobbs.

17 A. Yes.

18 Q. And the limb begins to fall, and you tell him to
19 watch out. What happens next, in your own words?

20 A. I yell to Tommy to move, and within seconds I --
21 I guess he just looked up and that's -- the limb
22 just -- just hit him. Because it was -- by the
23 time I saw it falling and yelling, I mean, it was
24 right on him.

25 Q. Okay. And the base of that limb flipped over and

1 -- well, let me ask you this question. Looking
2 back on the accident, do you believe the HOA
3 caused Mr. Hobbs' injuries?

4 A. No.

5 Q. And do you believe the HOA is at fault for Mr.
6 Hobbs' injuries?

7 A. No.

8 Q. Okay. Is there anything Mr. Hobbs could have
9 done to avoid this?

10 A. I guess we both could -- should have waited until
11 he had all the limbs cut.

12 Q. Okay. I understand. So do you believe Mr. Hobbs
13 could have avoided the injury if he had waited
14 until the limb's cut to walk underneath the
15 branch?

16 A. Yes, yeah.

17 Q. Okay. And if he had done that, he would have
18 avoided being injured?

19 A. Right.

20 Q. Okay. And what about Mr. Lambright? Is there
21 anything he could have done to avoid Mr. Hobbs
22 being injured?

23 A. Told us to wait until he had it cut.

24 Q. Okay. And if Mr. Lambright had asked you guys to
25 wait and not walk under the branches, Mr. Hobbs

1 years, as a contractor, with this HOA; is that
2 right?

3 A. Right.

4 Q. So you understand, generally, the working
5 relationship between the HOA and the contractors,
6 who's responsible for what; is that right?

7 A. Uh-huh.

8 Q. Okay. Here on page 4, starting in paragraph 22,
9 a letter "A," you'll see where the Complaint
10 filed by Mr. Hobbs' attorney alleges what the HOA
11 did wrong. Could you read "A" out loud for me?

12 A. "In failing to keep Tommy and other persons from
13 coming near the area where the tree was cutting
14 was concerning."

15 Q. Do you believe that the HOA made any mistakes in
16 this respect?

17 A. I don't think this is the HOA's fault.

18 Q. Okay, and that's fair. And so if anyone was
19 keeping Mr. Hobbs from coming near the area where
20 the branches were coming down, was it the
21 responsibility of the other HOA members?

22 A. I wouldn't think so.

23 Q. Okay. And would that have been something that
24 Mr. Lambright would have been responsible for?

25 A. Yes.

1 A. Uh-huh.

2 Q. And with respect to those allegations that you
3 read, do you think that the HOA did anything
4 wrong?

5 A. I don't think the HOA did.

6 Q. Okay. And some of those responsibilities or
7 allegations, where do you think they would lie?

8 A. Probably on Lee, with him cutting it.

9 Q. And that's Mr. Lambright?

10 A. Yes. That's correct.

11 Q. Okay. And is there anything you read in this
12 Complaint that you think the HOA failed to do or
13 did wrong that caused Mr. Hobbs to get hurt?

14 A. No.

15 Q. Okay. And just to wrap up, do you think the HOA
16 did anything wrong at all in this case?

17 A. Not that I know of. I mean, it's -- like I say,
18 the work was between, you know, Tommy and Lee.
19 And, well, I mean, Tommy is the president of the
20 HOA, so --

21 Q. Do you think that there's anything that the rest
22 of the HOA should have done differently?

23 A. Hired a professional.

24 Q. Okay.

25 A. That's what they had done in the past.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF PICKENS	)	C/A No.: 2014-CP-39-00613
	)	
Charles Thomas Hobbs and Mary Hobbs,	)	
	)	
Plaintiffs,	)	
	)	MEMORANDUM IN OPPOSITION
vs.	)	TO DEFENDANT'S MOTION FOR
	)	SUMMARY JUDGMENT
Fairway Oaks Homeowners Association,	)	
	)	
Defendant.	)	
_____	)	

Plaintiffs submit this memorandum in opposition to Defendant's Motion for Summary Judgment. Defendant moves for Summary Judgment as to Plaintiffs' causes of action on the ground that because Lee Lambright was an independent contractor, it is not liable for his actions. However, Defendant is liable for Lambright's actions as it had a non-delegable duty of reasonable care when making repairs or improvements, including when maintaining trees in the common area, so that Defendant cannot escape liability because of Lambright's status as an independent contractor.

I. STATEMENT OF FACTS

- 1) Plaintiff Tommy Hobbs was struck in the head by a tree limb on August 21, 2012.
- 2) Plaintiff Tommy Hobbs suffered memory loss as a result of the accident and does not recall the events that occurred on August 21, 2012. (See Deposition of Tommy Hobbs, pg. 31, ll. 12-14, Exhibit A)
- 3) The accident occurred on the common areas of the Fairway Oaks Townhome development which was owned by Defendant.

- 4) Pursuant to the Declaration of Covenants and Restrictions for Fairway Oaks Townhouses, Easley, South Carolina and Provisions for Fairway Oaks Homeowners' Association ("Covenants and Restrictions"), Defendant was responsible for maintaining the common areas. The Covenants and Restrictions provide: "Section 12. Common Area Maintenance. Common Areas shall be the responsibility of the Association, which shall maintain the parking lots, grounds and common buildings. The Association shall make such capital improvements to common areas as the shareholders may determine to be in the best interest of Fairway Oaks Townhouses. The Association shall maintain liability insurance for the common areas." (Covenants and Restrictions, Article VI, Section 12, pg. 18, Exhibit B)
- 5) Plaintiff Tommy Hobbs was the President of the HOA at the time of his accident, and he had been for many years. (See Deposition of Tommy Hobbs, pg. 15, ll. 16-19, Exhibit A)
- 6) Plaintiff Tommy Hobbs' duties as president were set forth in Defendant's By-Laws which provide that "The president shall preside at all meetings of the Board of Directors, shall see that orders and resolutions of the Board of Directors are carried out and sign all notes, checks, leases, mortgages, deeds and all other written instruments." (Bylaws, Article XI, Section 4, pg. 6, Exhibit C)
- 7) In his role as President, Plaintiff Tommy Hobbs hired Lee Lambright to cut the tree limb.
- 8) Lambright was a local handyman who performed various jobs for Defendant and the residents of Fairway Oaks. (See Deposition of Lee Lambright, pg. 12, ll. 11-18; pg. 13, l. 12 – pg.14, l. 12, Exhibit D)

- 9) Lambright asked Plaintiff Tommy Hobbs to help him carry a ladder to the site where the tree limb would be cut as the ladder was too large for him to handle by himself. (See Deposition of Lee Lambright, pg. 16, l. 18 – pg. 17, l. 2, Exhibit D)
- 10) Plaintiff Tommy Hobbs agreed, and on August 21, 2012 did in fact assist Lambright in taking the ladder to the job sight and setting it up. (See Deposition of Lee Lambright, pg. 25, ll. 14-16, Exhibit D)
- 11) After getting the ladder set up, Lambright began to work on the tree limb. (See Deposition of Lee Lambright, pg. 26, ll. 20-22, Exhibit D)
- 12) The various witnesses have provided differing accounts of what Plaintiff Tommy Hobbs was doing as Lambright worked on the tree.
 - a. Lambright testified that Plaintiff Tommy Hobbs was just standing off to the side. (See Deposition of Lee Lambright, pg. 28, l. 25- pg. 29, l. 6, Exhibit D)
 - b. Benny Roper testified that Plaintiff Tommy Hobbs was talking to David Lappin. (See Deposition of Benny Roper, pg. 38, ll. 9-11, Exhibit E)
 - c. David Lappin, Defendant's landscaper at the time, testified that Plaintiff Tommy Hobbs was pulling branches out from underneath the tree. (See Deposition of David Lappin, pg. 28, ll. 14-19, Exhibit F)
- 13) Lambright cut a large tree limb, however the limb did not fall all the way to the ground, and was leaning against the tree. After cutting the tree limb, Lambright climbed down and spoke with Plaintiff Tommy Hobbs and Daniel Lappin. Lambright then went back to the tree and pushed the already cut limb over onto the ground. The limb struck Plaintiff Tommy Hobbs in the head. (See Deposition of Lee Lambright, pg. 31, l. 4- pg.32, l. 24; pg. 33, l. 22- pg. 34, l. 13, Exhibit D)

- 14) While cutting tree limbs and pushing over the tree limb after it had been separated from the tree, Mr. Lambright took no safety precautions, provided no warnings and did not look to make sure everyone was out of the way immediately prior to pushing over the tree limb. (See Deposition of Lee Lambright, pg. 57, ll. 13-24; pg. 58, l. 23 – pg. 59, l. 3, Exhibit D).

II. ARGUMENT

“Summary judgment is proper only when it is clear that ‘there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.’ Rule 56(c), SCRPC. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party.” Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). (internal citations omitted).

A. DEFENDANT HAD A NON-DELEGABLE DUTY OF REASONABLE CARE WHEN MAKING REPAIRS OR IMPROVEMENTS, INCLUDING WHEN MAINTAINING TREES IN THE COMMON AREA, AND IS LIABLE FOR THE NEGLIGENT ACTIONS OF LEE LAMBRIGHT

Plaintiff Tommy Hobbs was injured when he was struck in the head by a tree limb cut and pushed over by Lee Lambright. It is undisputed that Mr. Lambright was hired by Defendant to cut the tree limb, and that the tree from which the limb was cut and fell and the spot where Plaintiff Tommy Hobbs was standing when he was hit by the tree limb were both in the common area owned by Defendant. It is undisputed that Mr. Lambright cut and pushed over the tree limb which hit Tommy in the head, causing his severe injuries. Further, it is undisputed that, prior to pushing over the tree limb after it had been separated from the tree, Mr. Lambright took no

safety precautions, provided no warnings and did not look to make sure everyone was out of the way immediately prior to pushing over the tree limb. (See Deposition of Lee Lambright, pg. 57, ll. 13-24; pg. 58, l. 23 – pg. 59, l. 3, Exhibit D). Defendant had a duty to maintain the common area where Plaintiff Tommy Hobbs was injured. The Declaration of Covenants and Restrictions For Fairway Oaks Townhouses, Easley, South Carolina and Provisions for Fairway Oaks Homeowners' Association provides in pertinent part:

"Section 12. Common Area Maintenance. Common Areas shall be the responsibility of the Association, which shall maintain the parking lots, grounds and common buildings. The Association shall make such capital improvements to common areas as the shareholders may determine to be in the best interest of Fairway Oaks Townhouses. The Association shall maintain liability insurance for the common areas." (Covenants and Restrictions, Article VI, Section 12, pg. 18, Exhibit B)

Defendant was carrying out its duty to maintain the common areas when it hired Lambright to cut the tree limb which struck Tommy.

Defendant contends that it is not liable for Lambright's negligent actions because he was an independent contractor. Defendant states "[b]ecause Lambright is an independent contractor, Defendant is not liable for Lambright's negligence, and Defendant is entitled to judgment as a matter of law." (Memorandum of Law in Support of Defendant's Motion for Summary Judgment, pg. 6). It is true that "[t]he general rule is that an employer is not vicariously liable for the negligent acts of an independent contractor." Rock Hill Telephone Co. v. Globe Communications, Inc., 363 S.C. 385, 390 (2005) (internal citations omitted). However, "[a]n

exception to the general rule is that "[a] person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an employee." Id. (internal citations omitted). In Simmons v. Tuomey Regional Medical Center, our Supreme Court noted a number of non-delegable duties that have been recognized in South Carolina. The Court stated, "[t]his Court and the Court of Appeals have applied the nondelegable duty doctrine in several situations. An employer has a nondelegable duty to employees to provide a reasonably safe work place and suitable tools, and remains vicariously liable for injuries caused by unsafe activities or tools under the employer's control. A landlord who undertakes repair of his property by use of a contractor has a nondelegable duty to see that the repair is done properly, and remains vicariously liable for injuries caused by improper repairs. A common carrier has a nondelegable duty to ensure that cargo is properly loaded and secured, and remains vicariously liable for injuries caused by an unsecured load. A bail bondsman has a nondelegable duty to supervise the work of his employees, and remains vicariously liable for injuries caused by those employees. A municipality has a nondelegable duty to provide safe streets even when maintenance is undertaken by the state Highway Department, and remains vicariously liable for injuries caused by defective repairs." 341 S.C. 32, 42-43 (2000). In Simmons, the Court found that a hospital had a non-delegable duty with regard to physicians who practice in their emergency rooms, despite the fact that this non-delegable duty exception had not previously been specified. Id. at 53.

One such circumstance in which a non-delegable duty was found, as set forth above, was "[a] landlord who undertakes repair of his property by use of a contractor has a nondelegable duty to see that the repair is done properly, and remains vicariously liable for injuries caused by

improper repairs.” Id at 42-43. This non-delegable duty was considered in Durkin v. Hansen, wherein the Court stated that “where the landlord undertakes to repair or improve the demised premises, whether he is under an obligation imposed by a covenant on his part to repair or improve or not, he is required to exercise reasonable care in making such repairs or improvements, and is liable for injuries caused by his negligence or unskillfulness or that of his servants and employees in making them or in leaving the premises in an unsafe condition.” 313 S.C. 343, 346-47 (Ct. App. 1993). Further, the Court stated that “[a] landlord who makes repairs and improvements on the demised premises owes a duty of reasonable care to the occupying tenants which he cannot escape by placing the work with an independent contractor. This is especially true where the work to be done is attended with danger to the tenant. Moreover, a landlord owes his tenants a non-delegable duty not to create unsafe conditions on premises and is thus vicariously liable for torts of his independent contractor.” Id at 348. (internal citations omitted). In Durkin a tenant was injured by the negligence of an independent contractor carpet cleaner. The landlord was obligated to maintain the condominium premises by virtue of its lease agreement with the tenant.¹ Id at 347-348. Like the agreement in Durkin, the Covenants and Restrictions in the present case created an obligation on the part of Defendant to maintain the common area. (Covenants and Restrictions, Article VI, Section 12, pg. 18, Exhibit B)

Defendant asserts that the current case does not fall within one of the non-delegable duty exceptions to the general rule that a principal is not liable for the acts of an independent contractor, and therefore the exception does not exist. Defendant states “[w]hile the general rule is clear- in South Carolina, a principal is not responsible for the negligence of an independent contractor- a few particularized exceptions have been recognized under the ‘nondelegable duty

¹ In Durkin, the Court states that, in addition to the duties set forth in the rental agreement, Defendants also had duties imposed by the South Carolina Residential Landlord Tenant Act. 313 S.C. at 348 and 349.

doctrine.’ However, no exception applies here.” (Memorandum of Law in Support of Defendant’s Motion for Summary Judgment, pg. 6). The question of whether a homeowners association (“HOA”) has a non-delegable duty of reasonable care when making repairs or improvements, including when maintaining trees in the common area, is a novel question in South Carolina. Other courts have found that HOAs have non-delegable duties in regard to common areas and features. In Affan v. Portofino Cove Homeowners Association, the California 4th District Court of Appeals found that an HOA had a non-delegable duty to property owners to maintain common area plumbing, and that the HOA could be liable for damage caused by an independent contractors’ negligent actions. See 189 Cal. App. 4th 930, 945 (2010 Cal. App. 4th). In Vasquez v. Lago Grand Homeowners Association, the court noted that the Defendant HOA had a duty to keep the premises secure, and was liable for their failure to do so, as a result of its contractual promise to do so, and that it could not escape liability because it had hired an independent contractor. 900 So.2d 587, Foot Note 7. The fact that this issue has not been specifically addressed does not mean that Defendant did not have a non-delegable duty. In Simmons, the defendant hospital argued that the non-delegable duty of hospitals was not supported by South Carolina law. 341 S.C. 32, 42. The Court, in addressing this novel issue of law and finding that a non-delegable duty existed, reasoned “[t]he cited cases clearly illustrate that a person or entity entrusted with important duties in certain circumstances may not assign those duties to someone else and then expect to walk away unscathed when things go wrong.” Id at 44. In the present case, the facts are very similar to the already recognized non-delegable duty owed by a landlord to a tenant. Here, Defendant was obligated to maintain the common areas by the Covenants and Restrictions and hired an independent contractor to perform the necessary tree work. Similarly, in Durkin, the defendant undertook maintenance which it was obligated to

perform pursuant to its lease, by hiring an independent contractor. In the present case, the independent contractor's negligence caused Plaintiffs' injuries, like the negligence of the independent contractor in Durkin. The fact that this is a novel issue should not preclude Plaintiffs recovery against Defendant. Instead, the Court should find that Defendant had a non-delegable duty of reasonable care when making repairs or improvements, including when maintaining trees in the common area, so that Defendant is liable for Lambright's negligence just as if Lambright had been an employee of Defendant, and deny Defendant's Motion for Summary Judgment.

**B. DEFENDANT MAKES SEVERAL ARGUMENTS THAT ARE NOT RELEVANT TO THE
GROUNDS CITED AS THE BASIS FOR THEIR MOTION FOR SUMMARY JUDGMENT AND
DO NOT ENTITLE THEM TO SUMMARY JUDGMENT**

**a. Defendant appears to argue that Plaintiff Tommy Hobbs' own alleged
negligence should prevent Plaintiffs' recovery**

Defendant appears to argue that Plaintiff Tommy Hobbs is liable for his injuries so that Defendant should be entitled to Summary Judgment. Defendant spends several pages discussing Plaintiff Tommy Hobbs' actions and why he was negligent. (Memorandum of Law in Support of Defendant's Motion for Summary Judgment, pgs. 4-6). However, it is well settled that questions of comparative negligence are properly questions of fact for the jury to determine. Our Supreme Court stated that "[t]he determination of respective degrees of negligence attributable to the plaintiff and the defendant presents a question of fact for the jury, at least where conflicting inferences may be drawn." *Hurd v. Williamsburg County*, 363 SC 421, 429 (2005). Here, there is evidence that Lambright's negligence was responsible for Plaintiffs' injuries. (See Deposition of Lee Lambright, pg. 57, ll. 13-24; pg. 58, l. 23 – pg. 59, l. 3). Defendant even states that "all

evidence points to the negligence of two parties: Plaintiff and independent contractor Lee Lambright.” (Memorandum of Law in Support of Defendant’s Motion for Summary Judgment, pg. 5). Because conflicting inferences can be drawn, the degree to which Plaintiff Tommy Hobbs was comparatively negligent as alleged by Defendant is properly a jury question.

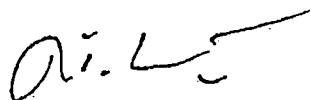
b. Defendant also appears to argue that because Plaintiff Tommy Hobbs, acting in his capacity as President of Defendant, hired Lambright, Plaintiffs should be prevented from recovery

Defendant also seems to argue that because Plaintiff Tommy Hobbs hired Lambright on behalf of Defendant, he is prevented from recovering for Lambright’s negligence. Defendant states “the only mistake the HOA could have made, according to witness testimony, was a mistake made by Plaintiff himself: hiring a non-professional instead of a professional tree service.” (Memorandum of Law in Support of Defendant’s Motion for Summary Judgment, pg. 5). This argument might be persuasive were Plaintiffs asserting that Defendant was liable because it was negligent in hiring Lambright. However, Plaintiffs did not assert negligent hiring as a basis for Defendant being liable. Therefore, the fact that Plaintiff Tommy Hobbs hired Lambright on behalf of Defendant in his capacity as president of Defendant has no bearing on Defendant’s argument that it is not liable for Lambright’s negligence because he was an independent contractor.

III. CONCLUSION

For the reasons detailed herein, Plaintiff’s Motion for Summary Judgment should be denied.

RESPECTFULLY SUBMITTED,



Raymond T. Wooten (S.C. Bar # 81483)
SMITH, JORDAN & LAVERY, P.A.
1810 East Main Street
Post Office Box 1207
Easley, SC 29641-1207
Office: (864) 855-1661
Fax: (864) 855-1685
wooten@smithjordan.com
Attorney for Plaintiffs

Easley, South Carolina
August 6, 2015

Exhibit A

15

1 Q. But whatever he did, whatever the doctor did for you
2 with a pill --

3 A. He gave me a pill and it went away. I haven't had
4 it since.

5 Q. Even after this accident, you haven't had that
6 burning feet problem since?

7 A. No, I haven't had burning nothing.

8 Q. Okay. Good.

9 A. Toes or nothing, legs or nothing.

10 Q. Good. All right. Now, when did you move to Fairway
11 Oaks?

12 A. In 2002.

13 Q. I guess when you moved to Fairway Oaks, did you
14 immediately join the homeowners association?

15 A. You're automatically a homeowner. There's 18 units.

16 Q. And have you held positions with the homeowners
17 association?

18 A. President from 2007. I resigned after I couldn't do
19 my duties from this accident, after this accident.

20 Q. Approximately, when did you resign, if the accident
21 was in August 2012?

22 A. That's when I -- not long after. We had a paint job
23 going on and I wanted to finish it. I didn't do
24 anything but walk around to make sure they showed
25 up, that's all. I didn't do anything else.

1 ladder and saw or is that --

2 A. I don't know. I don't know.

3 Q. Does the HOA have a ladder?

4 A. No. I can honestly say no. We don't have a ladder.

5 Q. Do y'all have any --

6 A. We don't have any tools.

7 Q. I was going to ask do you all provide Mr. Lambright

8 with any tools?

9 A. He has his own.

10 Q. He has his own tools.

11 A. Or he goes and borrows.

12 Q. So the day of, do you remember anything leading up

13 to the accident?

14 A. No, I don't even remember getting out of bed.

15 Q. Really?

16 A. The whole day.

17 Q. The whole day is just kind of --

18 A. Nothing. When you put 48 staples in your head, you

19 don't remember a whole lot.

20 Q. Yes, sir. I'm not trying to doubt you.

21 A. You don't doubt me, no, I know.

22 Q. I just need to make sure it's clear to me. So if I

23 ask you anything about the circumstances before the

24 accident or the accident itself, you have no memory

25 of it?

Exhibit B

damaged or destroyed portions of the property to as good condition as formerly. All such insurance proceeds shall be deposited in a bank or other financial institution, the accounts of which bank or institution are insured by a Federal governmental agency, with the provisions agreed to by said bank or institution that such funds may be withdrawn only by signature of at least one-third (1/3) of the members of the Board of Directors, or by an agent duly authorized by the Board of Directors. The Board of Directors shall obtain bids from at least two reputable contractors, and then may negotiate with any such contractor, who may be required to provide a full performance bond for the repair, reconstruction or rebuilding of such building or buildings.

(10) Also, the Association may levy in any calendar year, a special assessment for the purpose of defraying the cost of construction, reconstruction, repair or replacement of a building or buildings containing single family residential units, to the extent that insurance proceeds under a group insurance policy containing a Replacement Cost Endorsement are insufficient to pay all costs of said construction, reconstruction, repair or replacement to as good condition as prior to damage or destruction by fire or other casualty covered by said insurance.

(11) The reconstructed or repaired residence shall be substantially identical to the destroyed residence, unless a change shall be approved by the Board, and shall be constructed in conformity with plans submitted to and approved by the Board prior to construction.

(12) If a dwelling is not habitable by reason of damage, the obligation of the owner to pay annual assessment installments shall be suspended either for a period of ninety (90) days or until the dwelling is restored to a habitable condition, whichever shall first occur. In the event a dwelling is damaged or destroyed, and the owner does not begin repair or reconstruction within thirty (30) days following the damage or destruction, he shall remove or cause to be removed, at his expense, all debris from the lot, so that it shall be placed in a neat, clean and safe condition; and if he fails to do so, the Association may cause the debris to be removed, and the cost of removal shall constitute a lien upon the dwelling until paid by the owner, unless the dwelling is thereafter acquired by the Association.

Section 12. Common Area Maintenance. Common Areas shall be the responsibility of the Association, which shall maintain the parking lots, grounds and common buildings. The Association shall make such capital improvements to common areas as the shareholders may determine to be in the best interest of Fairway Oaks Townhouses. The Association shall maintain liability insurance for the common areas.

Section 13. Exterior Maintenance of Buildings. In addition to maintenance of the common area, the Association shall provide.

Exhibit C

shall be conclusive evidence of any assessment therein stated to have been paid.

ARTICLE X

Director's Meetings

Section 1. The annual meeting of the Board of Directors shall be held at the discretion of the Board of Directors with ample notice given to each member.

Section 2. Ten (10) days written notice of such annual meeting shall be given each Director.

Section 3. The transaction of any business at any meeting of the Board of Directors, however called and noticed, or whenever held, shall be as valid as though made at a meeting duly held after regular call and notice if a quorum is present, and, if either before or after the meeting, each of the Directors not present signs a written waiver of notice, or consent to the holding of such a meeting, or an approval of the minutes thereof. All such waivers, consents, or approvals shall be filed with the corporate records and made part of the minutes of the meeting.

Section 4. The majority of the Board of Directors shall constitute a quorum thereof.

ARTICLE XI

Officers

Section 1. The officers shall be president, a vice-president, a secretary, a treasurer. Any or all officers may be but shall not be required to be members of the Board of Directors.

Section 2. The officers shall be chosen by a majority of the Directors.

Section 3. All officers shall hold office during the pleasure of the Board of Directors.

Section 4. The president shall preside at all meetings of the Board of Directors, shall see that orders and resolutions of the Board of Directors are carried out and sign all notes, checks, leases, mortgages, deeds and all other written instruments.

Section 5. The vice-president shall perform all the duties in the absence of the president.

Section 6. The secretary shall be ex officio the secretary of the Board of Directors, shall record the votes and keep the

1 Q. Okay.

2 A. I'm just a neighborhood friend, and I do a lot of
3 little projects for people; but I don't have a
4 business, so to speak or --

5 Q. Okay. So you're not a contractor and you're more
6 of a neighborhood friend?

7 A. Yeah.

8 Q. And you're a friend of Tommy Hobbs; is that
9 right?

10 A. Right.

11 Q. And he said would you come help us out and do
12 some projects for the HOA?

13 A. Yeah.

14 Q. And that's how you began working at the HOA
15 property?

16 A. Right.

17 Q. And that work continued for seven or eight years?

18 A. Yes, probably so.

19 Q. Okay. Do you have a business that's
20 incorporated?

21 A. No, no.

22 Q. Are you a licensed contractor?

23 A. No.

24 Q. Are you bonded?

25 A. No.

- 1 Q. Do you have worker's comp insurance?
- 2 A. No.
- 3 Q. Do you have any employees?
- 4 A. No.
- 5 Q. Do you have other clients?
- 6 A. Off and on I do. Yes, I guess you would say.
- 7 Q. Okay. And how were you selected to perform the
- 8 handyman work? Was it an election by the Board;
- 9 or was it just a question Tommy asked you and you
- 10 said yes, I'll do it for you?
- 11 A. Yeah, he just -- he just asked me.
- 12 Q. Okay. And each job that you performed -- well,
- 13 let me ask you this. Over those seven or eight
- 14 years, how many projects do you think you
- 15 performed on the property?
- 16 A. A couple of dozen, anyway. A lot of them were
- 17 inside work that the residents themselves asked
- 18 me to do.
- 19 Q. Okay. So also the residents would hire you in
- 20 their own capacity and not just --
- 21 A. Right.
- 22 Q. -- through the HOA?
- 23 A. Right.
- 24 Q. And how many times do you think over the last
- 25 eight years you went to that property to perform

1 work?

2 A. Probably a hundred times, if you add the days
3 together that I'd be doing a painting project or
4 a ceramic tile or something like that.

5 Q. So it seems pretty frequent. I mean, you would
6 do --

7 A. Yeah.

8 Q. -- it on a regular basis?

9 A. Yeah.

10 Q. And what about for the HOA? How many of those
11 projects would have been for the HOA?

12 A. Maybe, maybe a third.

13 Q. So more than thirty projects, at least, you
14 performed for the HOA over eight years; is that
15 right?

16 A. Right.

17 Q. And did Tommy Hobbs hire you for each one of
18 those?

19 A. Yeah, pretty -- pretty much, he and the
20 treasurer.

21 Q. When you were asked to perform a new project, was
22 it Tommy Hobbs who asked you to do the work?

23 A. Generally.

24 Q. Okay.

25 A. Yeah.

1 A. He might have. I couldn't say yes or no on that
2 one.

3 Q. Okay. And you get to the property and you have
4 the ladder. Is it in your truck? Do you have a
5 truck?

6 A. Yeah.

7 Q. Okay. And does Mr. Hobbs help you get the ladder
8 out of your truck?

9 A. And again, I'm not sure; but I would guess he
10 did.

11 Q. And you two walked the ladder down together to
12 the grassy area where the limb was?

13 A. Yeah, probably so.

14 Q. Okay. And you testified that Mr. Hobbs helped
15 you set the ladder up?

16 A. Correct. That I do know for sure.

17 Q. Okay. And describe that for me. How did that
18 happen?

19 A. We stretched out the ladder to reach the limb and
20 just --

21 Q. Was it an extension ladder?

22 A. Yeah.

23 Q. And did it require two people to use the rope, to
24 pull the ladder up?

25 A. No.

1 Q. Okay.

2 A. We just -- we didn't have to put it up very high,
3 so we got it up high enough to reach the limb;
4 and one of us has to keep the end of the ladder
5 down and the other can walk the ladder up, you
6 know.

7 Q. Which one of you two kept the ladder down at the
8 bottom?

9 A. It was probably Tommy.

10 Q. And do you think that you climbed the ladder?

11 A. Not to get it set up.

12 Q. Okay.

13 A. You just -- you get under the ladder and walk it
14 up with your hands as you straighten it up, you
15 know.

16 Q. Okay. And that would have been what Tommy had
17 done; is that right?

18 A. He would have -- he would have held the end of
19 the ladder down, I believe.

20 Q. Okay. And after the ladder gets set up, what
21 happens next?

22 A. And I go up and start cutting the tree.

23 Q. All right.

24 A. The limb.

25 Q. Did Tommy ever check the ladder to make sure it

1 A. We set up the ladder, and that was the main
2 thing. Again, we probably talked about how this
3 thing is going to come down. It was a big, big
4 limb. And it stuck -- stuck out quite a ways and
5 had a lot of small twigs, little limbs on the end
6 of it. You know, it sort of umbrella'd out and
7 --

8 Q. Okay. So you two set the ladder up, and you
9 talked about how the limb would come down. What
10 else happened?

11 A. I don't know. We may have talked about news of
12 the day or something. It's hard telling.

13 Q. That's fine.

14 A. And I don't remember.

15 Q. You got to work; is that right?

16 A. Yeah.

17 Q. Were you at the top of the ladder?

18 A. Pretty much.

19 Q. Okay.

20 A. I actually got off on a limb. Because they were
21 so big and a lot of limbs up there, so I had
22 plenty of space to actually get on a limb and --

23 Q. You actually sat on it?

24 A. -- do the cutting? Yeah.

25 Q. Okay. So you were working at the top of the

1 ladder. Was Tommy working underneath the ladder?

2 A. No. He was standing off to the side.

3 Q. What was he doing while you began to take the
4 branches down?

5 A. As far as I know, he was standing off to behind
6 me.

7 Q. And is that closer to Benny Roper's condo?

8 A. No. It was more to the left.

9 Q. Okay.

10 A. Benny's condo was more to the south and --

11 Q. I have a photograph here of, I think, what shows
12 the accident scene. Do you recognize that?

13 A. Yeah.

14 Q. Okay.

15 A. Yeah.

16 Q. And we'll mark this Exhibit No. 1. Can you point
17 to me where you indicated to the west where Tommy
18 Hobbs was standing as he began to --

19 A. It would be out this direction.

20 Q. Okay. And there's a Sharpie right here. Could
21 you make a mark where you think Tommy was
22 standing before the tree limb came down?

23 A. About in here somewhere.

24 Q. Okay. Could you make a -- just make an "X", just
25 to make it a little bit darker?

1 Q. Did you ever climb down the ladder and get back
2 up a second time?

3 A. I don't believe so.

4 Q. Okay. So you stayed up there the whole time
5 until the branch came down and hit Tommy?

6 A. Yeah.

7 Q. Okay.

8 A. No, it didn't hit him when it first came down.

9 Q. Okay. And can you explain that to me?

10 A. Well, the branch had so much weight on the
11 outside, over here towards this house.

12 Q. Okay.

13 A. You know, the branch came out here like this; and
14 it was big, a lot of -- a lot of twigs and stuff.
15 So when I cut about halfway through that 8 to 10
16 inch limb; it broke because of the weight out on
17 the end; and it came straight down and it rested
18 against the ladder, the ladder and the tree. And
19 it stood straight up, the limb of the tree was
20 sticking straight up. And it was resting on the
21 ground on all those twigs and branches. Okay?
22 So at that point, when I was still up there, I
23 cut the -- I cut the remaining bottom half of the
24 limb off, and it continued to stand straight up
25 against that ladder and the tree.

1 Q. Okay.

2 A. Okay? And then I'd come down, and I walked out
3 here. And by this time, the landscaper was
4 there, the guy that does the mowing.

5 Q. Is that Daniel Lappin?

6 A. Yeah, he and his helper Ray. They were standing
7 over here in this area where I have marked for
8 Tommy.

9 Q. Okay.

10 A. And so we stood there and talked a little bit.
11 Just what we talked about, I'm not sure. But
12 anyway, this tree limb was standing, still
13 standing up against this ladder and the tree.
14 Okay. So to get it down, it had to be tipped out
15 towards the house. And so I -- these guys were
16 all standing over in here, I would say, at least
17 25 to 30 feet away from where the limb was
18 standing up against the tree. And I walked in
19 behind that big limb to tip it out, to get it on
20 the ground. And it was so thick in there, that
21 when I -- I never saw Tommy move. I thought he
22 was still over here on the side, but apparently
23 he walked -- well, he had to. He walked in
24 there.

25 Q. Can you put an arrow towards where he walked --

1 A. Well, he actually -- he actually was about right
2 in here, I would say.

3 Q. And could you put an arrow showing where he would
4 have walked when you were --

5 A. Well, this is back about 30 feet. This is back
6 this way a ways, so he would have -- he would
7 have walked over in there. So why he walked
8 over, I have no idea; and I don't think anybody
9 else does, you know, as far as I know.

10 Q. Did he walk closer to the branch?

11 A. No, no. He actually -- actually, walked closer
12 to the house. But anyway, that branch was so
13 long, it -- when I walked in and tip it out,
14 that's when it hit him.

15 Q. Okay. Just so I understand this right, the
16 branch was separated but still leaning against
17 the main tree trunk; is that right?

18 A. Correct.

19 Q. And you walked underneath the branch, between the
20 tree --

21 A. Well, sort of around it.

22 Q. Okay. You walked around the branch, close to the
23 tree trunk, and actually pushed the branch
24 forward; is that right?

25 A. Correct.

1 Q. And then like a long arch, it tipped over?

2 A. Correct.

3 Q. And that's when the branch fell and hit Tommy
4 Hobbs in the head?

5 A. Yeah. That splintered end hit him on the top of
6 the head.

7 Q. And was it the end that was attached to the tree
8 trunk?

9 A. Yeah.

10 Q. Okay. So it sort of did a somersault when you
11 pushed it and hit him on top of the head; is that
12 right?

13 A. Yeah.

14 Q. Okay.

15 A. Yeah. It just sort of flipped on out.

16 Q. At the time of the accident, when you pushed the
17 branch forward and it hit Mr. Hobbs, how far
18 apart was Tommy Hobbs and Daniel Lappin standing?

19 A. I would guess at least 20 feet.

20 Q. Okay. So there was 20 feet between Lappin and
21 Hobbs. Could you see where they were standing
22 through all the branches when you pushed the tree
23 forward?

24 A. Not really, but --

25 Q. Were the tree branches and leaves blocking your

1 Q. Okay. So you talked to them, and then you came
2 back; and at that point you went in and you
3 pushed the limb over?

4 A. Right.

5 Q. And I believe when you described doing it the
6 first time, you said "tip out." When you said
7 "tip out," did you just mean push over?

8 A. Yeah, yeah.

9 Q. Okay. Now, prior to, I guess -- you said when
10 you went to push the tree over, you couldn't see
11 very well?

12 A. Right.

13 Q. Did you yell out or anything that you were about
14 to push it over?

15 A. No. I don't remember yelling.

16 Q. Could you see where the other people were once
17 you were up there to push the branch over?

18 A. I'm not sure if I could have or not, but I really
19 didn't look to see if they had moved from the
20 positions that they were in when I walked back
21 there. And I probably could have peered through
22 there somehow and just to get a little glimpse to
23 make sure that they were still over there where
24 they were, but --

25 Q. All right. And what type of cut did you make on

1 the branch initially? Were you trying to do
2 directional cutting, or did you just do a basic
3 type cut?

4 A. Just a straight cut, you know.

5 Q. Did you have any idea where the limb was going to
6 fall?

7 A. Well, yeah, yeah. They were all off to the side
8 when I first made the cut, but I didn't expect it
9 to stand up like that, you know. And I figured
10 it would just fall right down on the ground, so

11 --

12 Q. So, basically, if I'm getting this right, when
13 you were cutting, about halfway through the
14 branch cracked and the bottom half of it kind of
15 kept it attached?

16 A. Yeah. It -- it was hanging pretty much straight
17 down and it splintered, you know, the bottom part
18 like -- I don't know if you've ever seen a tree
19 cut like that, but it gets a lot of odd shape
20 ends to it and, you know, it gets pretty sharp.
21 That's the part that, I guess, ended up hitting
22 him in the head.

23 Q. Okay. Were there any physical barriers to keep
24 people away from the tree?

25 A. No.

1 Q. And was there anybody like working with you to
2 make sure nobody was in the way?

3 A. No.

4 Q. And you said that you think the only thing that
5 the HOA did wrong was not hiring a professional.
6 What do you think would have been done
7 differently if they had hired a professional?

8 A. Who knows, I don't know. They probably would
9 have come with a boom truck that has a lift on
10 it. And those guys, they tend to cut pieces,
11 like they may have cut part of the limb out on
12 the end and worked back towards the main trunk of
13 the tree. I'm just guessing that they could have
14 done that. And they may have just cut the whole
15 thing off like I tried to do, but --

16 Q. Do you think that they would have had somebody
17 there on the ground to keep people out, to keep
18 people away from the danger --

19 A. Well, they -- you know, they do that stuff every
20 day. And they get hurt too occasionally, just
21 had a guy in Easley about a year ago got killed
22 by a falling tree or a limb. You probably heard
23 about that, that Gantt. Yeah, it's a -- it's
24 dangerous work, no doubt about it.

25 Q. Did you actually see the limb hit Tommy?

Exhibit E

DEPOSITION OF BENNY ROPER

-38-

1 going on? What did you see?

2 A. I seen Mr. Lambright on the ladder, cutting limbs
3 up here. Tommy, he was down here and then he was
4 over there. I'm thinking that they threw a rope
5 with a drop tied to it around that limb to pull
6 down where they'd know which one to cut. But,
7 you know, I wasn't expecting this to happen, and
8 I wasn't really paying attention to what was
9 happening. At this time I -- when the accident
10 actually happened, Mr. Lappin had just got there;
11 and he was talking to Tommy. And I was right
12 here, and I just happened to be watching when Mr.
13 Lambright cut that limb that was right here. I'm
14 going to mark this limb. There was another limb
15 under it that had been cut, that hadn't fell to
16 the ground. It still liked this much being cut
17 and hanging down, and you can see that clearly if
18 you look at those limbs that were cut. But when
19 he cut this bigger limb right here on top, it
20 fell down on the smaller limb that hadn't fell
21 and both limbs at that time came down; and Tommy
22 was under them when they came down. I seen
23 Lappin run over there to Tommy, and I knew
24 something was wrong. I came out the front door
25 and came around the side of my house. And at

1 Hobbs in those five minutes?

2 A. No.

3 Q. Did he have a chainsaw going?

4 A. Yes.

5 Q. Was it a tall ladder?

6 A. Yes.

7 Q. So did he seem sort of separated from you and Mr.
8 Hobbs?

9 A. Yes.

10 Q. Okay. And that wasn't the kind of situation
11 where you two would talk back and forth? He just
12 kept cutting with a chainsaw. Is that right?

13 A. Right.

14 Q. Okay. And in those five minutes that you were
15 removing limbs, what did you see Tommy do, Mr.
16 Hobbs?

17 A. He was pulling limbs. We both were.

18 Q. Okay. And where was he pulling limbs from?

19 A. Underneath that tree.

20 Q. Okay. And so the pile of limbs where Tommy was
21 moving, was actually located until the branches
22 and under the tree; is that right?

23 A. Right.

24 Q. Okay. And as Mr. Lambright was sawing down
25 limbs, Tommy was walking underneath the tree and

STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

Charles Thomas Hobbs and Mary Hobbs,

☒ Plaintiff

v.

Fairway Oaks Homeowners Association

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2014-CP-39-000613

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

2015 OCT 2 PM 4 35

Plaintiff's Attorney: Raymond T. Wooten
Bar No. 81483
Address: Post Office Box 1207
Easley, SC 29641

phone: 864-855-1661 fax: 864-855-1685
e-mail: wooten@smithjordan.com other:

Defendant's Attorney:
Bar No.:
Address:
phone: fax:
e-mail: other:

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

- ☐ Written motion attached
☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

October 2, 2015
Date submitted

SECTION III: Motion Fee

- ☒ PAID AMOUNT: \$25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other: see

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

- Collected by: _____
☐ MOTION FEE COLLECTED: _____
☐ CONTESTED - AMOUNT DUE: _____

Date Filed:

undertakes repair of his property by use of a contractor has a nondelegable duty to see that the repairs are done properly, and remains vicariously liable for injuries caused by improper repairs.'...However, the landlord-tenant exception does not apply: Defendant is not a landlord and Plaintiff is not a tenant. Rather, Defendant is an HOA, and Plaintiff was its President. This case has no nexus to a landlord-tenant relationship, and this case does not involve a landlord who undertakes repairs. Plaintiff offers no statutory support or applicable case law that imputes the duties and obligations of a landlord onto an HOA." (Order pgs. 3-4). However, Plaintiffs did not argue that the landlord-tenant exception to the rule that a principal is not liable for the acts of an independent contractor applied in this case. Instead, Plaintiffs argued that whether or not a homeowners association owed a non-delegable duty when performing maintenance and making repairs was a novel issue of law. Plaintiffs argued that, because it was a novel issue of law, the Court should look to similar cases, such as the landlord-tenant exception, when determining whether Defendant had a non-delegable duty as to the acts of the independent contractor it hired. The Court erred in failing to recognize this exception to the general rule that a principal is not liable for the actions of its independent contractor, when such an exception exists in other similar contexts such as the landlord-tenant context.

3. The Court states that "Plaintiff also argued that the present case is analogous to other situations in which a principal was found to have a nondelegable duty so that they were liable for the actions of an independent contractor. However, there is no recognized exception in South Carolina that removes this case from the

general independent contractor rule. To find otherwise would require this court to expand the existing body of case law. Because there is no recognized exception to the general independent contractor rule, Defendant is entitled to judgment as a matter of law." (Order pg. 4). Whether a homeowners association has a nondelegable duty for the actions of independent contractors who perform repair and maintenance work on its property is a novel question of law. Because it is a novel question of law, the Court is not bound by any prior precedent, or any lack of precedent, and was free to decide the issue. Therefore, the Court erred in finding that Defendant was entitled to judgment because there was no already recognized exception to the general independent contractor rule.

4. The Court found that Defendant did not have a nondelegable duty for the acts of its independent contractor. It was undisputed that Defendant hired the independent contractor to perform maintenance work on a tree located in Defendant's common area, and that Defendant had a duty to perform this maintenance work. It is further undisputed that Plaintiffs were injured as a result of the independent contractor's negligence. It is true that "[t]he general rule is that an employer is not vicariously liable for the negligent acts of an independent contractor." Rock Hill Telephone Co. v. Globe Communications, Inc., 363 S.C. 385, 390 (2005) (internal citations omitted). However, "[a]n exception to the general rule is that '[a] person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an employee.'" Id. (internal citations omitted). The present case is similar to other circumstances

where the Court has found that a nondelegable duty exists, such as the landlord-tenant context. The Court erred in finding that Defendant did not have a nondelegable duty for the acts of its independent contractor, when a nondelegable duty exists in other similar circumstances, and where Defendant was delegating an absolute duty owed to Plaintiffs to an independent contractor.

5. The Court found that Defendant did not have a nondelegable duty for the acts of its independent contractor. This is a novel issue in South Carolina. The court erred in failing to consider the decisions of courts in other states who have determined that homeowners associations have nondelegable duties in circumstances similar to the present case. See Affan v. Portofino Cove Homeowners Association, 189 Cal. App. 4th 930, 945 (2010 Cal. App. 4th) and Vasquez v. Lago Grand Homeowners Association, 900 So.2d 587, Foot Note 7.
6. The Court found that Defendant did not have a nondelegable duty for the acts of its independent contractor. The Court found this despite the fact that Plaintiff Charles Thomas Hobbs, as a member of Defendant, was considered an invitee in Defendant's common area. See Landry v. Hilton Head Plantation, 317 SC 200, 204 (S.C. Ct. App. 1994). In other similar cases where the injured party had the same or a lesser status than Mr. Hobbs had as an invitee, the court has found a nondelegable duty exists. In Durkin v. Hansen, the court stated that "[a] landlord who makes repairs and improvements on the demised premises owes a duty of reasonable care to the occupying tenants which he cannot escape by placing the work with an independent contractor. This is especially true where the work to be done is attended with danger to the tenant. Moreover, a landlord owes his tenants

a non-delegable duty not to create unsafe conditions on premises and is thus vicariously liable for torts of his independent contractor." 313 S.C. 343, 348 (Ct. App. 1993). (internal citations omitted). As an invitee, Plaintiff Charles Thomas Hobbs had at least the same status as the tenant in Durkin, to whom the court found that the landlord owed a nondelegable duty when making repairs. Another exception to the general rule that a principal is not liable for the acts of its independent contractor involves customers in stores. See South Carolina Natural Gas Co. V. Phillips, 289 F.2d 143 (U.S. Court App. 4th Cir. 1961). Plaintiff Charles Thomas Hobbs, as an invitee, has the same status as a store customer. Given Plaintiff Charles Thomas Hobbs' status as an invitee, the Court erred in finding that Defendant did not owe him a nondelegable duty when a nondelegable duty has been found in other situations involving visitors with equal or lesser status.

7. The Court makes several factual findings which are unsupported, or for which there was conflicting evidence. The Court states that "With Plaintiff Charles Thomas Hobbs holding the bottom of the ladder, Lambright climbed up and began to remove branches." (Order, pg. 2). However, there is no testimony to support this factual finding. The only testimony is that Plaintiff Charles Thomas Hobbs helped set up the ladder, but not that he was holding the ladder as the independent contractor began to climb the ladder. (See Deposition of Lee Lambright, pg. 26, ll. 2-22).¹ The Court also states that "Plaintiff chose to be present and chose to stand in that particular location under the tree." (Order, pg.

¹The deposition excerpts referenced in this motion were attached to Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment, which is already on file with the Court. Copies are also attached hereto for the Court's convenience.

2) There is testimony which directly conflicts this factual finding. (See Deposition of Lee Lambright, pg. 28, l. 25- pg. 29, l. 6, Deposition of Benny Roper, pg. 38, ll. 9-11, Deposition of David Lappin, pg. 28, ll. 14-19). "The evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Knight v. Austin, 396 S.C. 518, 522, 722 S.E.2d 802, 804 (2012). Therefore, the Court erred by making these factual findings at summary judgment when there is conflicting evidence.

8. Defendant's motion was based on the narrow grounds that Defendant was not liable for the negligence of its independent contractor. In its memorandum in support of its Motion for Summary Judgment, Defendant states "[b]ecause Lambright is an independent contractor, Defendant is not liable for Lambright's negligence, and Defendant is entitled to judgment as a matter of law." (Memorandum of Law in Support of Defendant's Motion for Summary Judgment, pg. 6). It was undisputed that Plaintiffs were harmed by the negligence of an independent contractor hired by Defendant. It is further undisputed that the independent contractor was hired by Defendant to perform maintenance on a tree located in Defendant's common area. Beyond this, all factual findings by the Court are unnecessary. For example, the Court states that "Testimony from the resident indicates that Plaintiff Charles Thomas Hobbs advised he would hire a professional tree service based out of Liberty, S.C. on behalf of the HOA to remove the limb." (Order, pg. 1). This finding is unnecessary and not relevant to Defendant's Motion for Summary Judgment. To the extent that the Court considered unnecessary facts or made factual findings that were not germane to

the narrow issue of law on which Defendant moved for summary judgment, the Court erred in considering these facts and making these findings.

For the reasons set forth herein, Plaintiffs respectfully request an Order of this Court vacating its prior Order, and/or altering its prior Order, and/or amending its prior Order, and/or denying Defendant's Motion for Summary Judgment.

RESPECTFULLY SUBMITTED,



Raymond T. Wooten (S.C. Bar # 81483)
SMITH, JORDAN & LAVERY, P.A.
1810 East Main Street
Post Office Box 1207
Easley, SC 29641-1207
Office: (864) 855-1661
Fax: (864) 855-1685
wooten@smithjordan.com
Attorney for Plaintiffs

Easley, South Carolina
October 2, 2015

Deposition Transcript of Lee Lambright

2015 OCT 2 PM 4 35
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

1 Q. Okay.

2 A. We just -- we didn't have to put it up very high,
3 so we got it up high enough to reach the limb;
4 and one of us has to keep the end of the ladder
5 down and the other can walk the ladder up, you
6 know.

7 Q. Which one of you two kept the ladder down at the
8 bottom?

9 A. It was probably Tommy.

10 Q. And do you think that you climbed the ladder?

11 A. Not to get it set up.

12 Q. Okay.

13 A. You just -- you get under the ladder and walk it
14 up with your hands as you straighten it up, you
15 know.

16 Q. Okay. And that would have been what Tommy had
17 done; is that right?

18 A. He would have -- he would have held the end of
19 the ladder down, I believe.

20 Q. Okay. And after the ladder gets set up, what
21 happens next?

22 A. And I go up and start cutting the tree.

23 Q. All right.

24 A. The limb.

25 Q. Did Tommy ever check the ladder to make sure it

1 A. We set up the ladder, and that was the main
2 thing. Again, we probably talked about how this
3 thing is going to come down. It was a big, big
4 limb. And it stuck -- stuck out quite a ways and
5 had a lot of small twigs, little limbs on the end
6 of it. You know, it sort of umbrella'd out and
7 --

8 Q. Okay. So you two set the ladder up, and you
9 talked about how the limb would come down. What
10 else happened?

11 A. I don't know. We may have talked about news of
12 the day or something. It's hard telling.

13 Q. That's fine.

14 A. And I don't remember.

15 Q. You got to work; is that right?

16 A. Yeah.

17 Q. Were you at the top of the ladder?

18 A. Pretty much.

19 Q. Okay.

20 A. I actually got off on a limb. Because they were
21 so big and a lot of limbs up there, so I had
22 plenty of space to actually get on a limb and --

23 Q. You actually sat on it?

24 A. -- do the cutting? Yeah.

25 Q. Okay. So you were working at the top of the

1 ladder. Was Tommy working underneath the ladder?

2 A. No. He was standing off to the side.

3 Q. What was he doing while you began to take the
4 branches down?

5 A. As far as I know, he was standing off to behind
6 me.

7 Q. And is that closer to Benny Roper's condo?

8 A. No. It was more to the left.

9 Q. Okay.

10 A. Benny's condo was more to the south and --

11 Q. I have a photograph here of, I think, what shows
12 the accident scene. Do you recognize that?

13 A. Yeah.

14 Q. Okay.

15 A. Yeah.

16 Q. And we'll mark this Exhibit No. 1. Can you point
17 to me where you indicated to the west where Tommy
18 Hobbs was standing as he began to --

19 A. It would be out this direction.

20 Q. Okay. And there's a Sharpie right here. Could
21 you make a mark where you think Tommy was
22 standing before the tree limb came down?

23 A. About in here somewhere.

24 Q. Okay. Could you make a -- just make an "X", just
25 to make it a little bit darker?

Deposition Transcript of Benny Roper

1 going on? What did you see?
2 A. I seen Mr. Lambright on the ladder, cutting limbs
3 up here. Tommy, he was down here and then he was
4 over there. I'm thinking that they threw a rope
5 with a drop tied to it around that limb to pull
6 down where they'd know which one to cut. But,
7 you know, I wasn't expecting this to happen, and
8 I wasn't really paying attention to what was
9 happening. At this time I -- when the accident
10 actually happened, Mr. Lappin had just got there;
11 and he was talking to Tommy. And I was right
12 here, and I just happened to be watching when Mr.
13 Lambright cut that limb that was right here. I'm
14 going to mark this limb. There was another limb
15 under it that had been cut, that hadn't fell to
16 the ground. It still liked this much being cut
17 and hanging down, and you can see that clearly if
18 you look at those limbs that were cut. But when
19 he cut this bigger limb right here on top, it
20 fell down on the smaller limb that hadn't fell
21 and both limbs at that time came down; and Tommy
22 was under them when they came down. I seen
23 Lappin run over there to Tommy, and I knew
24 something was wrong. I came out the front door
25 and came around the side of my house. And at

Deposition Transcript of David Lappin

1 Hobbs in those five minutes?

2 A. No.

3 Q. Did he have a chainsaw going?

4 A. Yes.

5 Q. Was it a tall ladder?

6 A. Yes.

7 Q. So did he seem sort of separated from you and Mr.
8 Hobbs?

9 A. Yes.

10 Q. Okay. And that wasn't the kind of situation
11 where you two would talk back and forth? He just
12 kept cutting with a chainsaw. Is that right?

13 A. Right.

14 Q. Okay. And in those five minutes that you were
15 removing limbs, what did you see Tommy do, Mr.
16 Hobbs?

17 A. He was pulling limbs. We both were.

18 Q. Okay. And where was he pulling limbs from?

19 A. Underneath that tree.

20 Q. Okay. And so the pile of limbs where Tommy was
21 moving, was actually located until the branches
22 and under the tree; is that right?

23 A. Right.

24 Q. Okay. And as Mr. Lambricht was sawing down
25 limbs, Tommy was walking underneath the tree and

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF PICKENS

CIVIL ACTION NO: 2014-CP-39-00613

Charles Thomas Hobbs and Mary Hobbs,

Plaintiff,

vs.

Fairway Oaks Homeowners Association,

Defendant,

**MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION TO ALTER OR
AMEND JUDGMENT
PURSUANT TO RULE 59, SCRPC**

**TO: RAYMOND T. WOOTEN, ESQUIRE, ATTORNEY FOR THE PLAINTIFF AND
THE PLAINTIFF ABOVE NAMED:**

The Defendant Fairway Oaks Homeowners Association submits this memorandum in response to Plaintiffs' Notice of Motion and Motion to Alter or Amend Judgment pursuant to Rule 59, *SCRPC*, as requested by the Honorable Judge Edward Miller.

BACKGROUND

On August 21, 2012, Plaintiff was injured on Fairway Oaks Townhouse common area grounds in Easley, S.C. when a tree limb being removed by independent contractor Lee Lambright fell and struck Plaintiff on the head. Lambright was hired by Plaintiff in Plaintiff's capacity as President of the Defendant HOA.

Suit was filed on May 15, 2014, and, after discovery of all pertinent facts was complete, Defendant filed a Motion for Summary Judgment on December 29, 2014. Oral arguments for that motion were heard on August 7, 2015. On September 15, 2015, the Honorable Judge Edward Miller signed an Order granting Defendant's Motion for Summary Judgment, attached hereto as Exhibit A. On October 7, 2015, Plaintiff filed a Motion to Alter or Amend the Order granting Defendant's Motion for Summary Judgment. Defendant submits this Memorandum of

Law in opposition to Plaintiff's motion, pursuant to Rule 59, *SCRCP*, as requested by Judge Miller.

ANALYSIS

For the reasons set forth in the prior Order, Defendant is entitled to judgment as a matter of law, and, for the reasons set forth herein, Plaintiff has provided no grounds to alter or amend the Court's Order granting Defendant's Motion for Summary Judgment. Responding to each of the claims of error alleged in Plaintiff's motion, Defendant would show unto the Court the following:

- 1. The Court did not err in its conclusion that Defendant is not liable as a matter of law for the actions of the independent contractor.**

The general rule in South Carolina is clear: a principal that hires an independent contractor is not liable for the negligence of that independent contractor, or for harm caused by that negligence. *Cherry v. Myers Timber Co., Inc.*, 404 S.C. 596, 745 S.E.2d 405 (Ct. App. 2013) (holding that timber company was not responsible for torts of logger hired to harvest and haul timber to mills because the logger was an independent contractor); *See* 18 S.C. Jur. Negligence § 35. While South Carolina courts have recognized a few, particularized exceptions to this rule under the "nondelegable duty doctrine," this Court's Order correctly acknowledged that the factual scenario here does not fall under a recognized exception to the general independent contractor rule.

Plaintiff's Motion to Alter or Amend contends that this case presents "a novel question of law" and that the Court was "free to decide" whether Defendant was liable for the negligence of its independent contractor. Indeed, the trial court remains the capable and appropriate venue to interpret and apply the law. It did just that in determining that no recognized exception to the independent contractor rule applies here. Instead, the Court was correct in noting that the

Plaintiff is effectively requesting the trial court expand the existing body of case law and announce a new exception to the independent contractor rule. This would create an entirely new line of actionable cases under the nondelegable duty doctrine not previously recognized under the laws of South Carolina. The Court considered Plaintiff's request to effectively develop new law, and declined to do so. This does not constitute error, as Plaintiff contends, but instead demonstrates the appropriate interpretation and application of the law by the Court.

Further, to the extent Plaintiff argues that the Court erred in failing to consider case law involving independent contractors and invitees, the Court did consider these cases, which are inapplicable to the factual scenario here. Specifically, Plaintiff cites to Durkin v. Hansen, 313 S.C. 343, 348 (Ct. App. 1993), in which the Defendant was a landlord and the Plaintiff was a tenant. Plaintiff also cites to South Carolina Natural Gas Co. v. Phillips, 289 F.2d 143 (U.S. Court App. 4th Cir. 1961), a case that upheld judgement for Defendants, for its reference to 1868 decision involving a shop owner and a customer. Conlin v. City Council of Charleston, 49 S.C.L. 201, 201 (S.C. Ct. App. 1868). The Court in South Carolina Natural Gas Co., however, recognized that a potential shop owner-customer exception had no bearing where the case at hand presented very different facts.

The same is true here: Unlike Durkin, Defendant is not a landlord and Plaintiff is not a tenant. Unlike the exception referenced in South Carolina Natural Gas Co., Defendant is not a shop owner and Plaintiff is not a customer. Here, Defendant is an HOA, and Plaintiff was its President. Further, the independent contractor here was hired by Plaintiff, and Plaintiff elected to be present on the date of his injury to help the independent contractor.

The Court considered every exception to the independent contractor rule raised by Plaintiff and correctly determined that, as a matter of law, no exception applies here. In so

doing, the Court correctly acknowledged that the factual scenario present in this case does not fall under a recognized exception. Instead, the well-established independent contractor rule applies, and Defendant cannot be held liable for the negligence of the independent contractor. While Plaintiff attempts to reargue its original position in order to persuade the Court to find a new exception, Plaintiff fails to point to any error of law in the Court's Order that would justify altering or amending the Court's Order.

2. The Court did not fail to "consider similar cases" including the "landlord-tenant exception" and "decisions of courts in other states" when determining Defendant is not liable for the negligence of the independent contractor.

In its Motion, Plaintiff argues the Court failed to "look to similar cases, such as the landlord-tenant exception" and that the court failed "to consider the decisions of courts in other states." However, the Court committed no such error. The Court's Order unequivocally states that the Court considered all "arguments of counsel," which includes the "similar cases" raised by counsel in its memorandum and at oral argument. Further, the Court itself is not bound to consider cases from outside jurisdictions or case law that is not controlling on an issue. Accordingly, Plaintiff's claim of error regarding the Court's failure to consider "similar cases" is without merit.

3. There are no material facts in dispute, and the Court did not err "in making ... factual findings at summary judgment "when there is conflicting evidence" or that were "unnecessary" or "not germane."

Finally, Plaintiff argues in its Motion that "the Court erred by making . . . factual findings at summary judgment where there is contradictory evidence." Plaintiff also argues the Court erred in making factual findings that Plaintiff considers "unnecessary" and "not germane."

However, parties agreed at Motion for Summary Judgment that there are no material facts in dispute and that, instead, this matter presented a pure question of law. Any factual differences

between witness testimonies raised by Plaintiff are not material and would have no effect on the outcome of Defendant's Motion for Summary Judgment. *See Wade v. Berkeley Cnty.*, 339 S.C. 495, 500, 529 S.E.2d 734, 736 (Ct. App. 1999), *on reh'g en banc*, 339 S.C. 513, 529 S.E.2d 743 (Ct. App. 2000) *aff'd in part, rev'd in part*, 348 S.C. 224, 559 S.E.2d 586 (2002) (recognizing that a certain factual dispute was "not material so as to prevent disposition by summary judgment").

Rather, there are no material facts in dispute here: Defendant acted as principal, Lambright acted as an independent contractor, and the pure question of law is whether Defendant is liable for the negligence of the independent contractor. The answer to that question is no. There are no relevant or material facts in dispute, and the Plaintiff's claim of an error here is without merit.

CONCLUSION

For the reasons set forth herein, it was proper for the Court to grant Defendant's Motion for Summary Judgment, and, while Plaintiff attempts to reargue its original position, Plaintiff fails to point to any error of law in the Court's Order that would justify altering or amending the Court's Order. Defendant prays the Court deny Plaintiff's motion.


John M. Grantland, Esquire
Elliott B. Daniels, Esquire
MURPHY & GRANTLAND, P.A.
P.O. Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for Defendant

Columbia, South Carolina
November 3, 2015

EXHIBIT A

STATE OF SOUTH CAROLINA

2015 SEP 23 AM 9 28

COUNTY OF PICKENS

IN THE COURT OF COMMON PLEAS

CLERK
PICKENS COUNTY
SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

CASE NO: 2014CP3900613

Charles Thomas Hobbs vs. Fairway Oaks Homeowners Association

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy: ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the Court:

Order Granting Summary Judgment from Judge Miller

Court Reporter:

PRESIDING JUDGE -

A copy mailed first class this 23rd day of September, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Raymond T Wooten P.O. Box 1207 Easley, SC 29641

ATTORNEY(S) FOR THE PLAINTIFF(S)

John Martin Grantland PO Box 6648 Columbia, SC 29260

ATTORNEY(S) FOR THE DEFENDANT(S)

s/ *Harold P. Welborn Jr*

Harold P Welborn, Jr. - Clerk of Court



State of South Carolina
The Circuit Court of the Thirteenth Judicial Circuit

Edward W. Miller
Judge

Greenville County Courthouse
305 E. North Street, Suite 219
Greenville, SC 29609-4751
Phone: (864) 467-8559
Fax: (864) 233-4173

September 15, 2015

Pat Welborn
Pickens County Clerk of Court
Pickens County Courthouse
214 E. Main Street
Pickens, SC 29671

RE: *Charles Thomas Hobbs and Mary Hobbs v. Fairway Oaks Homeowners Association*, 2014-CP-39-00613

2015 SEP 23 AM 9 28
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

Dear Clerk:

Enclosed please find Order Granting Summary Judgment to be filed and mailed to the parties. The order was signed by The Honorable Edward W. Miller on September 15, 2015.

Sincerely,

Hood Dawson
Law Clerk to the Honorable Edward W. Miller
305 E. North Street, Suite 219
Greenville, South Carolina 29601
(864) 467-8558
(864) 233-4173 Fax
emillerlc@sccourts.org

STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

Charles Thomas Hobbs and Mary Hobbs,

Plaintiff,

vs.

Fairway Oaks Homeowners Association,

Defendant,

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2014-CP-39-00613

**ORDER GRANTING SUMMARY
JUDGMENT**

This matter came before the Court on August 7, 2015 pursuant to a Motion for Summary Judgement filed by Defendant Fairway Oaks Homeowners Association. Elliott B. Daniels was present for the Defendant Fairway Oaks Homeowners Association and Raymond T. Whetzel was present for the Plaintiffs Charles Thomas Hobbs and Mary Hobbs.

FINDING OF FACTS

On August 21, 2012, Plaintiff Charles Thomas Hobbs was injured on Fairway Oaks Homeowners Association, (hereinafter "HOA" or "Defendant") common area grounds in Easley, S.C. when a tree limb being removed by an independent contractor fell and struck Plaintiff Charles Thomas Hobbs on the head.

Plaintiff is a longtime resident of Fairway Oaks, and in the five years before his injury, Plaintiff Charles Thomas Hobbs served as President of the HOA. The HOA had a duty to maintain its common areas, and as President of the HOA, Plaintiff Charles Thomas Hobbs arranged for the maintenance and repairs of Fairway Oaks' common areas.

In August, 2012 a resident called Plaintiff Charles Thomas Hobbs to request the removal of a tree limb hanging over his unit. Testimony from the resident indicates Plaintiff Charles Thomas Hobbs advised he would hire a professional tree service based out of Liberty, S.C. on behalf of the HOA to remove the limb. Instead, during a golf outing, Plaintiff asked a personal friend and local handyman, Lee Lambright, to remove the limb. Although Plaintiff Charles Thomas Hobbs hired Lambright for odd jobs at Fairway Oaks over the years, Lambright was not a licensed contractor, and he had no training in

tree limb removal. Lambright agreed to remove the limb if Plaintiff Charles Thomas Hobbs would help, and Plaintiff agreed. Plaintiff Charles Thomas Hobbs hired Lambright because Lambright was less expensive than a professional tree service.

On August 21, 2012, Plaintiff Charles Thomas Hobbs and Lambright met at Fairway Oaks, where Plaintiff helped remove the ladder from Lambright's truck and set it up against the tree. With Plaintiff Charles Thomas Hobbs holding the bottom of the ladder, Lambright climbed up and began to remove branches. While there is conflicting testimony as to where Plaintiff was standing and what he was doing, it is undisputed that he remained under or near the tree as Lambright was cutting limbs from the tree with a chainsaw. Plaintiff chose to be present and chose to stand in that particular location under the tree. A limb that Lambright cut fell and struck Plaintiff Charles Thomas Hobbs.

On May 14, 2014, Plaintiffs filed suit against Fairway Oaks HOA. Relevant discovery is complete, and there are no material facts relevant to this motion in dispute. Defendant moved for summary judgment on December 29, 2014, requesting the Court to find as a matter of law that the HOA is not liable for the negligence of the independent contractor.

STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Flemming v. Rose*, 350 S.C. 488 (2002); *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271 (Ct. App. 2002). Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

ANALYSIS

Defendant is not liable for the negligence of an independent contractor that Plaintiff, as the president of the HOA, hired, and no recognized exception to the general independent contractor rule applies. Accordingly, Defendant is entitled to judgment as a matter of law.

I. Defendant is not liable for the negligence of independent contractor Lee Lambright.

Generally, under South Carolina law, a principal that hires an independent contractor is not liable for the negligence of that independent contractor, or for harm caused by that negligence. *Cherry v. Myers Timber Co., Inc.*, 404 S.C. 596, 745 S.E.2d 405 (Cl. App. 2013) (holding that timber company was not responsible for torts of logger hired to harvest and haul timber to mills because the logger was an independent contractor); *See* 18 S.C. Jur. Negligence § 35.

Here, it is undisputed that Lambright was an independent contractor, and that Lambright was negligent. Indeed, Lambright himself admitted to several mistakes that were made in his work. Nonetheless, the general rule applies: Defendant is not liable for the negligence of Lambright because Lambright was an independent contractor. On the other hand, there are no facts which indicate the Defendant HOA was negligent in causing Plaintiff's injury. The general independent contractor rule applies here: "an employer is not liable for the torts of an independent contractor." *Cherry v. Myers Timber Co., Inc.*, 404 S.C. 596, 745 S.E.2d 405 (Cl. App. 2013). Because Lambright is an independent contractor, Defendant is not liable for Lambright's negligence.

II. There are no exceptions to take this case out of the general independent contractor body of law, and the landlord-tenant exception does not apply.

While the general rule is clear – in South Carolina, a principal is not responsible for the negligence of an independent contractor – a few, particularized exceptions have been recognized under the nondelegable duty doctrine. However, no recognized exception applies here.

Plaintiffs raised the landlord-tenant exception, which has only been applied hereto in the landlord-tenant context: "a landlord who undertakes repair of his property by use of a contractor has a nondelegable duty to see that the repairs done properly, and remains vicariously liable for injuries caused by improper repairs." *Simmons v. Tuomey Reg'l Med. Ctr.*, 341 S.C. 32, 43, 533 S.E.2d 312, 318 (2000), *citing* *Conner v. Farmers and Merchants Bank*, 243 S.C. 132, 139–40, 132 S.E.2d 385, 388–89 (1963); *Durkin v. Hansen*, 313 S.C. 343, 437 S.E.2d 550 (Cl.App.1993). However, the landlord-tenant

exception does not apply: Defendant is not a landlord and Plaintiff is not a tenant. Rather, Defendant is an HOA, and Plaintiff was its President. This case has no nexus to a landlord-tenant relationship, and this case does not involve a landlord who undertakes repairs. Plaintiff offers no statutory support or applicable case law that imputes the duties and obligations of a landlord onto an HOA.

Plaintiff also argued that the present case is analogous to other situations in which a principal was found to have a nondelegable duty so that they were liable for the actions of an independent contractor. However, there is no recognized exception in South Carolina that removes this case from the general independent contractor rule. To find otherwise would require this court to expand the existing body of case law. Because there is no recognized exception to the general independent contractor rule, Defendant is entitled to judgment as a matter of law.

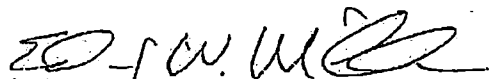
CONCLUSION

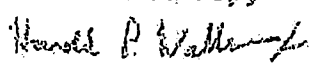
Defendant is not liable for the negligence of an independent contractor that Plaintiff, as president of the HOA, hired, and there is no recognized exception that removes this case from the general independent contractor body of law. The landlord-tenant exception does not apply because Defendant is not a landlord, and Plaintiff is not a tenant. After hearing the arguments of counsel and reviewing the testimony of the witnesses and parties in this case, the Court finds that there is no genuine issue of material fact, and the Defendant is entitled to judgment as a matter of law. The Defendant's Motion for Summary Judgment is accordingly granted.

It is **ORDERED, ADJUGED** and **DECREED** that the Defendant's Motion for Summary Judgment is hereby **GRANTED. IT IS SO ORDERED.**

Pickens, South Carolina

Date: 8/15/15


The Honorable Edward W. Miller
Circuit Court Judge for the Thirteenth Judicial Circuit

Certified Copy

Clerk of Court
Pickens County, SC
Dated: Sept. 2015
Page 137

State of South Carolina

County of Pickens

In the Court of Common Pleas

Charles Thomas Hobbs,

Plaintiff,

-vs-

Fairway Oakes Homeowners
Association,

Defendant.

2014-CP-39-00613

August 7, 2015

Transcript of Record

BEFORE:

The Honorable Edward Mileir, Judge

APPEARANCES:

Raymond T. Wooten, Esquire
Attorney for the Plaintiff

Elliott Daniels, Esquire
Attorneys for Defendants

Renee Tollison
Circuit Court Reporter

INDEX

Motion for Summary Judgment
Certificate of Reporter

PAGE
3
21

EXHIBITS

No

DESCRIPTION

ID EV

No exhibits were presented during the hearing

1 August 7, 2015

2 (WHEREUPON, court convened with all parties present
3 and the following proceedings were had commencing at
4 approximately 10:45 a.m.)

5 THE COURT: Hobbs versus Fairway.

6 MR. DANIELS: Your Honor, we do have a
7 memorandum in support of our motion for summary judgment.
8 We have hard copies. If you'd like for me to approach.

9 THE COURT: Yeah, that'd be good. I didn't
10 bring my computer with me.

11 MR. DANIELS: Just one's fine, or would you
12 like another one for the law clerk?

13 THE COURT: Okay.

14 MR. WOOTEN: Your Honor, if I could pass up
15 mine as well?

16 THE COURT: Yeah, sure.

17 MR. WOOTEN: It looks a little better than the
18 copy we emailed you.

19 THE COURT: Okay.

20 MR. DANIELS: May it please the Court. Your
21 Honor, my name is Elliott Daniels. I'm an attorney with
22 Murphy and Grantland in Columbia. And I represent the
23 defendant, Fairway Oaks Homeowners Association. Fairway
24 Oaks is a townhouse complex in Easley here in Pickens
25 County. Mostly older residents. It's on a golf course.

1 It's a nice quiet street. I represent the homeowners
2 association at Fairway Oaks.

3 The plaintiff in this case was the president of the
4 HOA. And he's suing the HOA because he was injured by an
5 independent contractor the plaintiff himself hired.

6 The parties in this -- you'll hear from Attorney
7 Wooten that we agree completely on the facts. This is a
8 purely legal question for the Court today. Is the HOA
9 liable for the negligence of an independent contractor
10 the plaintiff himself hired? Today we respectfully move
11 for summary judgment because we believe the answer to
12 that questions is no.

13 Briefly, Your Honor, here are the facts. The
14 plaintiff, who I understand is with us here today, he's a
15 long-time resident of Fairway Oaks. And he was the
16 president for about five years prior to his injury.

17 On August 18th, 2012, a resident living in the last
18 unit by the name of Benny Roper called the plaintiff to
19 request the removal of a tree limb that was hanging over
20 his unit. The plaintiff told Roper on the phone that
21 day, according to testimony, that he would hire a
22 professional tree service based out of Liberty, South
23 Carolina, on behalf of the HOA. Instead, during a golf
24 outing, the plaintiff asked a personal friend named Lee
25 Landbright to remove the limb. The plaintiff had hired

1 Landbright over the years for various odd jobs. But in
2 Landbright's words, quote, "I am not a contractor. I'm
3 just a neighborhood friend. I do a lot of little
4 projects for people."

5 Your Honor, Landbright is not a licensed contractor.
6 He's not bonded and insured. He has no employees. He is
7 not incorporated. He had never been hired to remove a
8 limb, and he had no training in limb removal or tree
9 service. By plaintiff's admission, he hired Landbright
10 because the labor was cheap, because Landbright costs
11 less than a professional tree service. And that's how,
12 Your Honor, an unskilled non-professional friend of the
13 plaintiff was hired for this work. And testimony makes
14 it clear that it was the plaintiff's decision alone to
15 hire Landbright. This was not a decision anyone else
16 made and not a decision anyone else at the HOA made.
17 Okay.

18 On August 20, Landbright and the plaintiff visited
19 the area. It was raining. They decided to come back the
20 next day. On August 21, Landbright and the plaintiff
21 arrived, again together, on the property. They carried
22 the ladder together, set up the ladder together, and the
23 plaintiff held the ladder for Landbright as he climbed up
24 to the top. The plaintiff was injured about fifteen to
25 twenty minutes after this happened. He remained under or

1 near the tree the plaintiff -- remained under or near the
2 tree as Landbright began removing limbs with the chain
3 saw. The plaintiff admitted that it was his own choice
4 to be present, it was his own choice to help, and it was
5 his own choice to stand where he was. No one at the HOA
6 asked him to do this. Witnesses have also indicated
7 there were safer areas for the plaintiff to stand. And
8 in a witness named Daniel Lapin's words, plaintiff was
9 picking up branches underneath the tree limbs that
10 Landbright was removing with the chainsaw. A limb fell,
11 hit the plaintiff on the head and he was hurt. No one
12 questions that. We're not here today to question whether
13 he was hurt. We're in complete agreement about the
14 facts. We're in complete agreement -- I don't believe --
15 we haven't reached damages at this point, but we agree
16 completely with the facts. And the question today for
17 the Court is a purely legal question.

18 After his injury, the plaintiff filed suit against
19 the HOA, of which he was the president, for his injury.
20 The question today for the Court is, is the HOA liable
21 for the negligence of Lee Landbright, an independent
22 contractor the plaintiff hired. To that we believe the
23 answer is no.

24 Your Honor, the general rule is clear. Under South
25 Carolina law, the principal that hires an independent

1 contractor is not liable for the negligence of that
2 independent contractor. Here the HOA is the principal;
3 Landbright is the independent contractor. And everyone
4 agrees Landbright was negligent. But the rule applies.
5 The HOA, as the principal, is not liable for the
6 independent contractor's negligence because Landbright is
7 an independent contractor.

8 And here's where the dispute between Attorney Wooten
9 and I comes. We believe there's no exception to the
10 rule. No court has ever recognized an exception that
11 applies in this case. Over time the court has recognized
12 a very few exceptions to the independent contractor rule
13 under the non-delegable duty doctrine. None apply here.

14 Attorney Wooten will argue that an exception
15 available only in the landlord/tenant context applies
16 here. It was recognized by the court in Simmons, and
17 Simmons references two other cases. And it says, quote,
18 "A landlord who undertakes repair of his property by use
19 of a contractor has a non-delegable duty to see that the
20 repairs are done properly and remains vicariously liable
21 for injuries caused by improper repairs."

22 Your Honor, the landlord/tenant exception does not
23 apply. The defendant is not a landlord, and the
24 plaintiff is not a tenant. Rather the defendant is an
25 HOA, and the plaintiff is its president. The exception

1 is not applicable here. There is no case law, and there
2 is no statutory support for applying the landlord
3 exception to an HOA or for applying the tenant exception
4 to the president of an HOA or for imputing the duties and
5 obligations of a landlord on an HOA.

6 As you know, Your Honor, those duties and
7 obligations have been developed very specifically over a
8 long period of time. They're even memorialized in
9 statute. The case law that Attorney Wooten will cite, in
10 fact, indicates that the duties in part arise out of the
11 Residential Landlord and Tenant Act. These duties do not
12 apply here. This is not a landlord case. This is not a
13 tenant case.

14 And further, Your Honor, even assuming for the sake
15 of this motion that this was brought by a tenant and the
16 defendant was a landlord and the exception did apply, the
17 exception leaves the plaintiff himself liable. Your
18 Honor, in the South Carolina Supreme Court words where
19 the plaintiff sought exception applies, quote, "The
20 delegating person remains liable for the breach." The
21 plaintiff was the delegating person. He is suing the HOA
22 because of a duty he delegated to an independent
23 contractor as president of the HOA. Essentially, he is
24 suing himself. It was his decision -- it was his
25 decision. He's the personification, the person of the

1 HOA. It was his decision to hire an independent
2 contractor. There's nothing the rest of the HOA could
3 have done either to hire or not hire Landbright, to go
4 that day and to help or to stand where the plaintiff did.
5 But, indeed, we don't need to reach that question because
6 the landlord/tenant exception does not apply.

7 Finally, Your Honor, I think that Attorney Wooten
8 will agree with me that there is not a scintilla of
9 evidence that the HOA itself was negligent. Witness
10 Lapin, said, quote, "I don't think this is the HOA's
11 fault." He was asked, "Do you believe the HOA did
12 anything wrong to cause this accident?" And he answered,
13 "No." He said the accident could have been avoided if
14 the plaintiff waited until after the limbs fell to walk
15 under the tree.

16 The second witness, Benjamin Roper, said it is --
17 the question was, "Is it your testimony that
18 responsibility for this case rests with Landbright and
19 the plaintiff?" He said, "Yes, sir." "And it does not
20 rest with the HOA?" "No, sir."

21 Finally, Your Honor, the independent contractor
22 himself said, "Of course, the plaintiff shared
23 responsibility for the accident." But he also admitted
24 that the independent contractor himself shares the blame
25 for the accident. He says that it was the plaintiff's

1 choice to help, his choice to hire him, his choice where
2 to stand, that he knew the limb was coming down, and that
3 it could have been avoided if he stood in a safer place.

4 There's not a scintilla of evidence that the HOA
5 itself was negligent, and there is no testimony that the
6 HOA could have done anything differently. All evidence
7 points to the negligence of two parties, the independent
8 contractor and the plaintiff himself, Your Honor.

9 And with this, I'll close. Your Honor, we agree
10 completely on the facts. We all agree here that
11 Landbright is at fault for this accident. The question
12 for the Court today is a pure question of law. Is the
13 HOA liable for the negligence of Lee Landbright, an
14 independent contractor the plaintiff hired?

15 There is no exception that has ever been recognized
16 in South Carolina law that applies here. There is no --
17 the plaintiff is essentially suing himself for hiring the
18 independent contractor, helping and standing where he
19 stood, Your Honor. We believe the answer to that
20 question is no, the HOA is not liable for the independent
21 contractor's conduct. And we believe there's no
22 exception that applies. And for that we ask the Court to
23 grant our motion for summary judgment.

24 THE COURT: Okay.

25 MR. DANIELS: Thank you, Your Honor.

1 MR. WOOTEN: Thank you, Your Honor. Raymond
2 Wooten here on behalf of Hobbs. At the outset, I would
3 note based on their memo, which is the notice they gave
4 us of what they're moving for summary judgment on,
5 they're moving on the ground of Landbright was an
6 independent contractor, and therefore, they're not
7 liable. And because of the grounds they're moving on, I
8 don't think that Tommy's position with the HOA, the fact
9 that he was the one that hired Landbright, earning
10 comparative negligence on Tommy's part are really
11 pertinent to today's legal issue that we're talking
12 about. Certainly, if we go to trial, those could be
13 issues that they would try and bring up. But as to the
14 independent contractor question, you know, it's a
15 different question.

16 And, Your Honor, Mr. Hobbs, he was president of the
17 HOA. He hired Mr. Landbright to cut this tree limb. Mr.
18 Landbright was the local handyman that they used over and
19 over for any kind of repairs they needed for the HOA, or
20 any individual's houses, he did it. He was just a local
21 retired man and charged a lot less than professionals.
22 And everybody used him and was always happy with his
23 work. They've even said it's undisputed that Mr.
24 Landbright was negligent. He even admitted it in his
25 deposition.

1 It's undisputed that the tree limb hit Mr. Hobbs in
2 the head.

3 THE COURT: Okay.

4 MR. WOOTEN: Undisputed that it was on the
5 common areas owned by defendant. And defendant's arguing
6 that because Mr. Landbright was an independent
7 contractor, he's not liable. There's no dispute that Mr.
8 Landbright was anything but an independent contractor.
9 And we also don't dispute the general rule that an
10 independent -- or that a principal is not liable for the
11 conduct of an independent contractor. But there are
12 certain exceptions to the general rule where a principal
13 has a non-delegable duty and cannot escape liability by
14 hiring an independent contractor.

15 And in Simmons versus Tuomey Regional, they went
16 through the recognized exceptions at that point. An
17 employer has a non-delegable duty to provide a safe work
18 place and suitable tools. A landlord who undertakes
19 repair to his property has a non-delegable duty to see
20 that the repair is done properly and is liable for any
21 resulting injuries. A common carrier has a non-delegable
22 duty to ensure that cargo is properly loaded and secured.
23 A bail bondsman has a non-delegable duty to supervise the
24 work of his employees. A municipality has a non-
25 delegable duty to provide safe streets and remains liable

1 even when the highway department is responsible for
2 maintenance. And then in South Carolina Natural Gas
3 Company versus Phillips, a shopkeeper has a non-delegable
4 duty to its customers.

5 Now, our courts have not specifically addressed
6 whether an HOA has a non-delegable duty to use reasonable
7 care when maintaining and repairing common areas. We
8 think that this situation is analogous to the
9 landlord/tenant situation, which is an accepted and
10 already outlined exception to the general rule of non-
11 liability.

12 And the main case on this is Dirken versus Hanson.
13 And I've got a copy of that case if Your Honor would like
14 me to pass it up.

15 THE COURT: Thank you.

16 MR. WOOTEN: Your Honor, this case revolves
17 around carpet cleaning where a landlord hired a carpet
18 cleaner to clean the carpets. A tenant slipped and fell
19 on residue that was left on a tile floor, suffered an
20 injury. And the Court ended up holding that the landlord
21 was liable for the independent contractor's actions
22 because it had a non-delegable duty. And if you look at
23 that case, it says both as a result of its contractual
24 duty with the tenant and then also as a result of the
25 Residential Tenant Landlord Act that both independently

1 it has a duty when it does undertake to make a repair to
2 do that -- or owes a duty of reasonable care. The court
3 stated, "The landlord who makes repairs and improvements
4 on the demised premises owes a duty of reasonable care to
5 the occupying tenants which he cannot escape by placing
6 the work with an independent contractor. This is
7 especially true where the work to be done is attended
8 with danger to the tenant. Moreover, the landlord owes
9 his tenants a non-delegable duty not to create unsafe
10 conditions on premises and is thus vicariously liable for
11 torts of his independent contractor."

12 In the current case, the defendant hired an
13 independent contractor to perform maintenance. The
14 independent contractor in this case, like the contractor
15 in Dirken, performed maintenance. In that case, the
16 court held that the landlord cannot escape liability
17 because of the negligent party's status as an independent
18 contractor. And the court noted that the landlord in
19 that case had a duty to make those repairs. Just like in
20 this case, the covenants and restrictions for defendant
21 require defendant to maintain the common areas.

22 Another case, Your Honor, is Simmons versus Tuomey
23 Regional Medical Center. And I already went over the
24 exceptions to the general rule they noted. That's a very
25 pertinent case to ours which is in that case, the Supreme

1 Court was taking up the novel issue of whether a hospital
2 had a non-delegable duty to its patients even though it's
3 ER physicians were independent contractors. The court
4 did, in fact, find that the hospital owed a non-delegable
5 duty to its patients. And the court reasoned, "The cited
6 cases clearly illustrate that a person or entity
7 entrusted with important duties in certain circumstances
8 may not assign those duties to someone else and then
9 expect to walk away unscathed when things go wrong." And
10 in addressing the novel issue, the Court looked at other
11 states that had already decided the issue.

12 One -- and I tried to look for other states that
13 have addressed the similar issue as this case. In
14 California, there's a case where property owners sued
15 their HOA because negligent plumbing repairs had caused
16 their apartment to flood. Not their apartment. I'm
17 sorry. I think it was a condo -- to flood, and they had
18 suffered property damage. And the court held that the
19 HOA could be liable for the negligent repairs of its
20 independent contractor.

21 Another case was in Florida. The estate -- property
22 owner was murdered. Or I'm sorry. The property owner
23 was murdered at a condominium. His estate filed suit.
24 The HOA had a contractual duty to provide security of the
25 property like the defendant here had a contractual duty.

1 to maintain the common areas. The condominium in the
2 Florida case, they hired a security firm to perform the
3 security. And the court stated that the homeowners
4 association could not escape liability because it had
5 hired an independent contractor.

6 And in Simmons, like here, the defendant argued that
7 there was no basis in law for the non-delegable duty.
8 The fact that it was a novel issue in that case did not
9 mean that there was no non-delegable duty owed. And the
10 court found that one did, in fact, exist.

11 And, Your Honor, I think you have to look at this
12 case like an employer/employee situation. If Landbright
13 had been an employee of the defendant, there would be no
14 basis for the motion they're filing today. In certain
15 situations, such as the one we have here, independent
16 contractors are treated the same as employees for
17 liability purposes. The present case is extremely
18 similar to the already established landlord/tenant non-
19 delegable duty exception.

20 Your Honor, I'd also note that members of a
21 homeowners association are considered invitees in common
22 areas. That's the highest standard owed by a property
23 owner to a person on their property. This is the same
24 status afforded to customers in stores where there's a
25 non-delegable duty owed. This is at least the same

1 status as tenants have in an apartment owned by their
2 landlord.

3 And based on all of this, we believe that the
4 defendant owed a non-delegable duty to use reasonable
5 care when performing the maintenance and repairs. And
6 defendant cannot escape liability by virtue of
7 Landbright's status as an independent contractor.

8 Your Honor, I would note Tommy's negligence, as I
9 said at the start, that's a jury question. Clearly,
10 they've admitted that the independent contractor was
11 negligent. The fact that he would hire the independent
12 contractor, we never asserted a claim for negligent
13 hiring or said the HOA was negligent because of hiring
14 Mr. Landbright. And it has no bearing on whether or not
15 they're liable because he's an independent contractor.

16 Also, the fact that Tommy was president of the HOA
17 at the time doesn't preclude him from recovering. Your
18 Honor, I think the best way to think of that is if the
19 mayor of Pickens was walking down the street and tripped
20 on a hole in the sidewalk that shouldn't have been there,
21 because he's mayor doesn't mean he can't go and sue the
22 city for the problem with the sidewalk. His
23 responsibility as set out in the bylaws as testified to
24 by Benny Roper and Tommy, the last two presidents of the
25 HOA, was that the president's only duty was to hire a

1 contractor. It was not to perform any work.

2 Therefore, Your Honor, based on all this, we think
3 that there is a non-delegable duty by defendant to use
4 reasonable care. And based on this non-delegable duty,
5 they're potentially liable. And it's really a jury
6 question to determine liability. And, therefore, we
7 think their motion should be denied.

8 MR. DANIELS: Your Honor, briefly in response
9 if I may. We heard from Attorney Wooten much about
10 Florida case law, California case law and case law about
11 emergency rooms and ER doctors and patients. Those don't
12 apply here. This is not an emergency room, and this is
13 not a patient. And this is not Florida, and this is not
14 California. The defendant in this case is not a
15 landlord, and the plaintiff in this case is not a tenant.
16 The defendant is an HOA, and the landlord -- and the
17 plaintiff its president. This is not analogous to the
18 Pickens analogy where in this case every decision that
19 potentially would have led to the HOA's liability was
20 made by the plaintiff. In the Pickens example with the
21 mayor, that was not the case.

22 Your Honor, Ray was right that there are certain
23 exceptions to the rule, but none apply here. None. The
24 one that applies here has never been recognized in South
25 Carolina law. And he's required to come today with a

1 theory of liability against a homeowners association. He
2 didn't come with that today. He came today with the
3 theory of liability against a landlord. There's no
4 landlord here today. There's no tenant here today. And
5 the Residential Landlord Tenant Act does not apply.

6 There is not a scintilla of evidence that the HOA
7 was negligent in any way. And there's not an exception
8 that would take this out of the general independent
9 contractor body of case law. And for that, the HOA is
10 not liable for the independent contractor's negligence
11 particularly.

12 And with that, Your Honor, we'll rest. And we ask
13 that the Court grant our motion for summary judgment.

14 MR. WOOTEN: Your Honor, very briefly. One
15 point I forgot to make. In the Simmons case, they do say
16 a person may delegate a duty to an independent
17 contractor. And they talk about the delegating person,
18 and Elliott mentioned that in his initial arguments. The
19 fact that they used a person, the way you look at it,
20 they could have used an entity. They could have said the
21 delegating party. They just happened to say -- use the
22 word person. So that doesn't imply that because Tommy
23 was the one that hired him, that in any way changes the
24 non-delegable duty doctrine.

25 That's all I have, Your Honor. Thank you.

1 THE COURT: Okay. Well, interesting arguments.
2 Well, I -- a very good argument. I am not, I think, in a
3 position to expand the scope of exception to the rule.
4 And so I'm going to grant their motion for summary
5 judgment, which is not what I normally do. Okay.

6 MR. DANIELS: Thank you, Your Honor. We can
7 have a proposed order to you by today.

8 MR. WOOTEN: Thank you.

9 THE COURT: Well, that's fine. Share it with
10 Mr. Wooten first.

11 MR. DANIELS: Okay. We'll do that.

12 THE COURT: And you can email it to us.

13 MR. DANIELS: Do you prefer they be sent to you
14 directly or to your clerk?

15 THE COURT: Well, both. Just send it to both.

16 MR. DANIELS: We'll do. Thank you, your Honor.

17 THE COURT: All right.

18 MR. WOOTEN: Thank you, Your Honor.

19 THE COURT: Good arguments. Interesting stuff.

20 (WHEREUPON, the hearing concluded at approximately
21 11:09 a.m.)

22 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

I do further certify that I am neither of kin,
counsel, nor interest to any party hereto.

Renee H. Johnson

Circuit Court Reporter

- 1 Q. But whatever he did, whatever the doctor did for you
2 with a pill --
- 3 A. He gave me a pill and it went away. I haven't had
4 it since.
- 5 Q. Even after this accident, you haven't had that
6 burning feet problem since?
- 7 A. No, I haven't had burning nothing.
- 8 Q. Okay. Good.
- 9 A. Toes or nothing, legs or nothing.
- 10 Q. Good. All right. Now, when did you move to Fairway
11 Oaks?
- 12 A. In 2002.
- 13 Q. I guess when you moved to Fairway Oaks, did you
14 immediately join the homeowners association?
- 15 A. You're automatically a homeowner. There's 18 units.
- 16 Q. And have you held positions with the homeowners
17 association?
- 18 A. President from 2007. I resigned after I couldn't do
19 my duties from this accident, after this accident.
- 20 Q. Approximately, when did you resign, if the accident
21 was in August 2012?
- 22 A. That's when I -- not long after. We had a paint job
23 going on and I wanted to finish it. I didn't do
24 anything but walk around to make sure they showed
25 up, that's all. I didn't do anything else.

1 Q. You said you were president from 2007 --

2 A. '07 until about --

3 Q. -- August, September 2012?

4 A. Something like that. Yeah, seven years exactly. I
5 looked on the minutes of the notes that we took and
6 it was July 7th.

7 Q. And before 2007, did you hold any other positions
8 with the homeowners association?

9 A. No.

10 Q. This isn't meant to be a stupid question, but what
11 was your job responsibility as the president of the
12 homeowners association?

13 A. It's going to be a stupid answer.

14 Q. That's okay.

15 A. This is 18 units. They're all about 65 to 90. The
16 guy that had it was unhealthy, he couldn't keep it.
17 So I was the youngest, so I got volunteered at one
18 meeting -- would I take it. And I had took a lot of
19 positions at 3M and they kind of volunteered me. We
20 only meet once a year and they volunteered me, kind
21 of.

22 Q. Were you at the meeting?

23 A. Yes. I didn't vote, but I was at the meeting.

24 Q. I was thinking that the best way to get elected to
25 something is to not show up.

1 A. Is don't show up, right.

2 Q. I've been elected by not showing up, so I can
3 appreciate that.

4 Now, as president, was one of your duties
5 hiring contractors to do work around the HOA?

6 A. It was to go through me. I had to approve them. It
7 could be recommended by secretary, treasurer, or
8 anybody, but I had to approve them.

9 Q. How about supervising contractors, did that go
10 through you, as well?

11 A. When you say supervising contractors, go to them if
12 I wanted something?

13 Q. Yes, sir.

14 A. Yeah. If they missed a spot painting, I'd tell
15 them. If they missed a shingle, I'd tell them,
16 stuff like that, but I had a handyman that did a lot
17 of our handy stuff.

18 Q. Who was your handyman? Was that Lee Lambright?

19 A. Lee Lambright.

20 Q. Let me ask you about Lee. How long have you known
21 Mr. Lambright?

22 A. Thirty years.

23 Q. Did you all work together at 3M?

24 A. No, I met him at the golf course. I play golf with
25 him.

1 Q. I guess y'all are friends?
2 A. Good Christian friends.
3 Q. I assume you have his contact information. If we
4 need to find him or talk to him, we could do that?
5 A. Uh-huh. Raymond.
6 Q. Raymond has it?
7 A. I think Raymond has it.
8 THE WITNESS: Don't you, Raymond?
9 MR. WOOTEN: I think I probably do. I can get
10 that for you, if you need that.
11 MR. GRANTLAND: Okay.
12 A. Yeah, if he don't, I can get it.
13 Q. So he's been a friend for, approximately, 30 years?
14 A. Uh-huh.
15 Q. Do you know what his background is in, what work did
16 he do before he was --
17 A. He's from the Amish Country, so he's from up in --
18 Q. He's from Pennsylvania?
19 A. Yeah.
20 Q. Now, does he have any licenses?
21 A. That, I don't know. You mean, contract licenses?
22 Q. Yes, sir, like a licensed plumber?
23 A. Bonded and everything like that?
24 Q. Yes, sir.
25 A. He may be bonded.

1 when he mowed, he would say, "Could you get that
2 trimmed? It's hitting me in the head when I mow."
3 And I'd get Lee to come out and take five minutes
4 and mow, but no, no tree limbs. I hired a guy. The
5 reason -- I won't go into it. I hired a guy who
6 came out in a bucket and he ripped me off, and I
7 quit using him because he would trim one limb,
8 charge me \$750, and then I said the heck with this,
9 I'll get me somebody that will trim it. I'm not
10 supposed to tell, but you understand this tree was
11 already three-quarters broken, okay?

12 Q. Right.

13 A. It wasn't just like he cut the tree. He finished
14 based on a phone call.

15 Q. And I'll get to that. I want to make sure I
16 understand exactly what happened, Mr. Hobbs.

17 A. Yeah.

18 Q. So the bucket truck man, do you recall when --

19 A. I had him cut the big ones about three months ago.

20 Q. Three months before your accident or since the
21 accident?

22 A. Yeah, the big ones. No, three months before the
23 accident. The big ones that you had to have a
24 bucket.

25 Q. Right.

- 1 A. See, we have tree limbs that hang over the buildings
2 as they grow and the people will start calling me
3 saying they're going to fall on my roof and knock a
4 hole in it. You know, 89-year-olds don't take much
5 patience.
- 6 Q. No.
- 7 A. And they call on anything.
- 8 Q. Who was the contractor in the bucket truck that cut
9 limbs three months before?
- 10 A. I knew you was going to ask that. He's out of
11 Liberty. I can't remember his name.
- 12 Q. But you hired him to cut some big limbs and he was
13 \$750?
- 14 A. He wanted 7-, 8-, 900, 10- -- thousand -- last time
15 it was 1100.
- 16 Q. He did the job, he just was expensive?
- 17 A. Yes, and he didn't do a good job. He didn't haul
18 off all of the broken limbs and stuff. And I made
19 Lee -- and Lee knew it. He picked up everything.
20 It looked like he'd run a vacuum cleaner back there
21 when he got through.
- 22 Q. How old is Lee?
- 23 A. He's probably -- I'm 70, so 74. He won't get on the
24 roof. He gets his son and son-in-law to get on the
25 roof.

1 crank a chainsaw. I don't even know how to crank
2 one.

3 Q. And I assume before this accident you've never had
4 any issues with anything Mr. Lambright had done at
5 Fairway Hills?

6 A. Oh, Lord, no. Good Christian man, goes to Rock
7 Springs. He's there when they open the door.

8 Q. That's a big, big church.

9 A. That's the building. He's there when they open the
10 door. Both the preacher and his son are members of
11 Smithfield. No.

12 Q. Are you a member of Rock Springs?

13 A. No.

14 Q. What church are you all members of?

15 A. Trinity Point. I'm the treasurer at Trinity Point.

16 Q. Is that a Baptist church?

17 A. Yes.

18 Q. I grew up Baptist. I moved to Columbia and married
19 a Methodist, but that's another story.

20 A. I was a Methodist.

21 Q. Let me take you now to the date of the accident.

22 How is it that you got Mr. Lambright out there
23 that day?

24 A. I got a phone call on Friday night. We had a
25 gentleman who moved in the end unit, I'd say, a

1 month before. He called me on Friday night.

2 Q. Who is that?

3 A. Benny Roper. And he said, "Mr. Hobbs, I know you
4 don't know me real well and you probably don't even
5 know me. I've got a tree limb broke back here. I'm
6 afraid it's going to fall on my house. Would you
7 come down and look at it?" And it wasn't quite
8 dark, so I walked down to the back and it had broken
9 and it was hanging.

10 Q. Right.

11 A. So I play golf with Lee on Saturday. I said, well
12 I'll just save this \$700 that this guy is going to
13 charge me, or eight, no more than that it, that
14 ain't but one or two cuts. So when I played golf
15 with Lee, he says, -- I've been told this and I
16 don't remember it, "But you've got to help me load
17 my ladder. I can't load it by myself."

18 Q. Right.

19 A. And I said, "Okay, I'll help you." I don't remember
20 him asking me or any of that. I don't remember
21 anything with that part, okay.

22 Q. Where did you all play golf?

23 A. Smithfield.

24 Q. Smithfield. Okay. I'm sorry.

25 A. I live across the street from it.

- 1 ladder and saw or is that --
- 2 A. I don't know. I don't know.
- 3 Q. Does the HOA have a ladder?
- 4 A. No. I can honestly say no. We don't have a ladder.
- 5 Q. Do y'all have any --
- 6 A. We don't have any tools.
- 7 Q. I was going to ask do you all provide Mr. Lambright
- 8 with any tools?
- 9 A. He has his own.
- 10 Q. He has his own tools.
- 11 A. Or he goes and borrows.
- 12 Q. So the day of, do you remember anything leading up
- 13 to the accident?
- 14 A. No, I don't even remember getting out of bed.
- 15 Q. Really?
- 16 A. The whole day.
- 17 Q. The whole day is just kind of --
- 18 A. Nothing. When you put 48 staples in your head, you
- 19 don't remember a whole lot.
- 20 Q. Yes, sir. I'm not trying to doubt you.
- 21 A. You don't doubt me, no, I know.
- 22 Q. I just need to make sure it's clear to me. So if I
- 23 ask you anything about the circumstances before the
- 24 accident or the accident itself, you have no memory
- 25 of it?

1 off. This city will pick them up if you put them
2 out in the front.

3 Q. Yes, sir.

4 A. I said, "Lee, I want them hauled out on the front.
5 I want them picked up." He said, "I'll do all
6 that." That's what I mean by vacuum cleaning and
7 things. He picked every limb up.

8 Q. Yes, sir. He made it look like it didn't fall at
9 all?

10 A. You didn't even know there was a limb there.

11 Q. Yes, sir. You stood where you stood voluntarily,
12 didn't you?

13 A. Yeah. I could have stood back to my house, you
14 know, and got back into bed with my wife, but I
15 didn't, you know.

16 Q. Yes, sir. I mean, you picked where you were
17 standing?

18 A. I picked where I was standing. I can't go this way,
19 I'd fall in the creek. So you can't go anywhere
20 down that way or you're in the creek. If you've
21 been out there, and it looks like you have, you're
22 going to fall in the creek. You can't see it
23 because it's --

24 Q. And I don't have a picture of the creek.

25 A. In fact, we're in a thing with the city right now to

1 house, and it would have hit the house.

2 Q. Yes, sir.

3 A. It was broke that bad that it was leaning that far.
4 It would have hit this brand new house here, okay.

5 Q. Yes, sir. Well, so do you believe the homeowners
6 association did anything wrong?

7 A. The association did anything wrong?

8 Q. Yes, sir.

9 A. The good Lord broke the limb, I didn't do it, you
10 know. The good Lord broke the limb when he had the
11 storm Friday night or Thursday night. Friday day.

12 Q. Yes, sir.

13 A. But no, I don't believe that they actually went down
14 with a chainsaw and started chopping on it, you
15 know.

16 Q. Yes, sir. You tell me if you disagree. You were
17 acting on behalf of the association when you brought
18 Mr. Lambright out there?

19 A. Yes.

20 Q. And you were acting on behalf of the association
21 when you were standing there?

22 A. Yes.

23 Q. If you were not president, you'd have been home or
24 on the golf course?

25 A. Yes.

1 Q. Would you expect the homeowners association to warn
2 you of the hazard of Mr. Lambright's cutting the
3 tree limb? Would you expect someone from the
4 homeowners association to warn you of that?

5 A. Other than Benny who warned me to come cut the tree
6 because it was going to fall if we didn't cut the
7 tree, and when we went down there, we made the
8 decision to cut the tree. They agreed. Benny
9 obviously -- obviously, he'd already agreed. He was
10 the one who called me.

11 Q. Sure. Right.

12 A. But between us three, we agreed that the limb was
13 going to hit his house if we didn't get it cut. So
14 we cut it.

15 Q. And you made the decision to use Lee, is that
16 correct?

17 A. Yes. Well, I made -- Lee, because the tree was
18 barely hanging, and the guy charges \$750 to come out
19 in a bucket, and I wasn't paying \$750 to pay a guy
20 in a bucket to come out and cut a limb.

21 Q. And you trusted Lee?

22 A. Yeah, he's done thousands of jobs for us.

23 Q. It also says, "In failing to take proper
24 precautionary steps to keep persons like Tommy from
25 encountering such a hazard."

- 1 Q. Yes, sir.
- 2 A. Yeah. But I can't think of any -- you know, it was
- 3 a bad storm.
- 4 Q. Yes, sir. And I don't want to put words in your
- 5 mouth, I just want to make sure I understand. The
- 6 main reason you're suing the association is because
- 7 you were out there as the president and you got hit
- 8 by the tree limb, is that correct?
- 9 A. The one reason, yes.
- 10 Q. I mean, had you not been president, you would not
- 11 have been out there?
- 12 A. I had not been president, I don't know. I don't
- 13 know. I can't answer that.
- 14 Q. You got Lee out there. You picked Lee to do it.
- 15 A. Yeah, I picked Lee.
- 16 Q. And you voluntarily stood where you stood?
- 17 A. I volunteered, to my knowledge, of standing where I
- 18 did. And I don't remember anything. I could have
- 19 stood down here, you know, but I did. Lee made a
- 20 statement I think, according to him, to tell us to
- 21 get out of the way, to make sure we were out of the
- 22 way, and he told us that. Now I'm quoting him. I
- 23 don't know that for a fact because I don't remember.
- 24 Q. The next thing you remember, I guess, you were in
- 25 the hospital?

DEPOSITION OF LEE LAMBRIGHT

-11-

1 Tommy was always in charge of a -- or was for
2 years in charge of the senior's group.

3 Q. Okay.

4 A. So he'd always go off in the last group. Well,
5 sometimes, on occasion, I'd be paired with the
6 last group; but normally I'd be in one of the
7 first groups, so --

8 Q. Okay. So you golfed with him throughout the year
9 on and off, and you'd describe your relationship
10 as friends; right?

11 A. Yeah, sure.

12 Q. And do you keep up with Tommy on a social basis
13 before the accident and after the accident?

14 A. Yeah; yes.

15 Q. And you know his wife and you know where he
16 lives?

17 A. Correct.

18 Q. And had his phone number?

19 A. Yeah.

20 Q. And you check in on him regularly?

21 A. Yes.

22 Q. Okay. And so, tell me how you became the
23 contractor for the HOA. I guess you were working
24 for Tommy and he said --

25 A. I'm not a contractor.

1 Q. Okay.

2 A. I'm just a neighborhood friend, and I do a lot of
3 little projects for people; but I don't have a
4 business, so to speak or --

5 Q. Okay. So you're not a contractor and you're more
6 of a neighborhood friend?

7 A. Yeah.

8 Q. And you're a friend of Tommy Hobbs; is that
9 right?

10 A. Right.

11 Q. And he said would you come help us out and do
12 some projects for the HOA?

13 A. Yeah.

14 Q. And that's how you began working at the HOA
15 property?

16 A. Right.

17 Q. And that work continued for seven or eight years?

18 A. Yes, probably so.

19 Q. Okay. Do you have a business that's
20 incorporated?

21 A. No, no.

22 Q. Are you a licensed contractor?

23 A. No.

24 Q. Are you bonded?

25 A. No.

DEPOSITION OF LEE LAMBRIGHT

-13-

1 Q. Do you have worker's comp insurance?

2 A. No.

3 Q. Do you have any employees?

4 A. No.

5 Q. Do you have other clients?

6 A. Off and on I do. Yes, I guess you would say.

7 Q. Okay. And how were you selected to perform the
8 handyman work? Was it an election by the Board;
9 or was it just a question Tommy asked you and you
10 said yes, I'll do it for you?

11 A. Yeah, he just -- he just asked me.

12 Q. Okay. And each job that you performed -- well,
13 let me ask you this. Over those seven or eight
14 years, how many projects do you think you
15 performed on the property?

16 A. A couple of dozen, anyway. A lot of them were
17 inside work that the residents themselves asked
18 me to do.

19 Q. Okay. So also the residents would hire you in
20 their own capacity and not just --

21 A. Right.

22 Q. -- through the HOA?

23 A. Right.

24 Q. And how many times do you think over the last
25 eight years you went to that property to perform

DEPOSITION OF LEE LAMBRIGHT

-14-

1 work?

2 A. Probably a hundred times, if you add the days
3 together that I'd be doing a painting project or
4 a ceramic tile or something like that.

5 Q. So it seems pretty frequent. I mean, you would
6 do --

7 A. Yeah.

8 Q. -- it on a regular basis?

9 A. Yeah.

10 Q. And what about for the HOA? How many of those
11 projects would have been for the HOA?

12 A. Maybe, maybe a third.

13 Q. So more than thirty projects, at least, you
14 performed for the HOA over eight years; is that
15 right?

16 A. Right.

17 Q. And did Tommy Hobbs hire you for each one of
18 those?

19 A. Yeah, pretty -- pretty much, he and the
20 treasurer.

21 Q. When you were asked to perform a new project, was
22 it Tommy Hobbs who asked you to do the work?

23 A. Generally.

24 Q. Okay.

25 A. Yeah.

1 Q. And was it the treasurer who gave you a check?

2 A. Yeah.

3 Q. Okay. How long have you been doing work as a
4 handyman? Is that how you describe yourself, a
5 handyman?

6 A. Yeah, I guess. I don't know. We used to have
7 some apartment buildings in Indiana and I -- and,
8 of course, I grew up on a farm, and we just did a
9 lot of our work. And I've been doing stuff like
10 that for many years on the side.

11 Q. When you were a sports writer, a sports editor,
12 would you do handy work on the side for money?

13 A. I mainly did it just for myself.

14 Q. And did you only begin to get paid for your work
15 as a handyman once you came to South Carolina?

16 A. Yeah.

17 Q. Okay. So it sounds like you've had about
18 fourteen years of paid work as a handyman, but
19 you describe yourself more as a neighborhood
20 friend than a professional contractor; is that
21 right?

22 A. Right; yeah.

23 Q. Okay. What kind of projects would you be hired
24 for?

25 A. Trim work, painting, ceramic tile, plumbing

1 leaks, repairs.

2 Q. What about --

3 A. Door problems.

4 Q. What about tree limbs? Have you ever been hired
5 before to cut tree limbs?

6 A. I don't believe I had.

7 Q. So the time that you cut tree limbs in August of
8 2012, when the branch fell on Mr. Hobbs, was that
9 the first time you've ever been hired to cut tree
10 limbs?

11 A. I believe it was. I had cut a lot of them myself
12 for my own properties, but --

13 Q. Did Mr. Hobbs know that, that you had never been
14 paid to cut tree limbs before?

15 A. I don't know. We didn't discuss that. I, of
16 course, have told him that, you know, I have a
17 saw and --

18 Q. So when he approached you with the tree-limb
19 project, how did that conversation go?

20 A. He -- he said they had this big limb back there
21 behind the house where Benny lives, and it was
22 getting close to it and wanted to know if I could
23 cut it off. And I said, "Well, I can do it, but
24 I have to get a guy to help me with the ladder.
25 It would take a big ladder to get up there." And

DEPOSITION OF LEE LAMBRIGHT

-22-

1 A. Right.

2 Q. Okay. And you had your own little side business,
3 and they would hire you for individual projects;
4 is that right?

5 A. Correct.

6 Q. Do you think that that would make you an
7 independent contractor in this case?

8 A. Probably so.

9 Q. Okay. What about Mr. Hobbs? Did he have any
10 experience in cutting tree limbs, that you know
11 of?

12 A. I doubt it. I don't know, maybe some small-type
13 projects over the years but --

14 Q. Okay. And before this incident and before this
15 tree-limb issue, had there ever been problems
16 with your work on the property?

17 A. Not that I'm aware of.

18 Q. Okay. And just so we're -- just to be clear, Mr.
19 Hobbs is the one who hired you for this work; is
20 that right?

21 A. I would say so; yeah.

22 Q. Okay. And he's the one who asked you to cut this
23 tree limb; is that right?

24 A. Yeah.

25 Q. And he did so probably because of your price and

DEPOSITION OF LEE LAMBRIGHT

-25-

1 A. He might have. I couldn't say yes or no on that
2 one.

3 Q. Okay. And you get to the property and you have
4 the ladder. Is it in your truck? Do you have a
5 truck?

6 A. Yeah.

7 Q. Okay. And does Mr. Hobbs help you get the ladder
8 out of your truck?

9 A. And again, I'm not sure; but I would guess he
10 did.

11 Q. And you two walked the ladder down together to
12 the grassy area where the limb was?

13 A. Yeah, probably so.

14 Q. Okay. And you testified that Mr. Hobbs helped
15 you set the ladder up?

16 A. Correct. That I do know for sure.

17 Q. Okay. And describe that for me. How did that
18 happen?

19 A. We stretched out the ladder to reach the limb and
20 just --

21 Q. Was it an extension ladder?

22 A. Yeah.

23 Q. And did it require two people to use the rope, to
24 pull the ladder up?

25 A. No.

1 Q. Okay.

2 A. We just -- we didn't have to put it up very high,
3 so we got it up high enough to reach the limb;
4 and one of us has to keep the end of the ladder
5 down and the other can walk the ladder up, you
6 know.

7 Q. Which one of you two kept the ladder down at the
8 bottom?

9 A. It was probably Tommy.

10 Q. And do you think that you climbed the ladder?

11 A. Not to get it set up.

12 Q. Okay.

13 A. You just -- you get under the ladder and walk it
14 up with your hands as you straighten it up, you
15 know.

16 Q. Okay. And that would have been what Tommy had
17 done; is that right?

18 A. He would have -- he would have held the end of
19 the ladder down, I believe.

20 Q. Okay. And after the ladder gets set up, what
21 happens next?

22 A. And I go up and start cutting the tree.

23 Q. All right.

24 A. The limb.

25 Q. Did Tommy ever check the ladder to make sure it

DEPOSITION OF LEE LAMBRIGHT

-28-

1 A. We set up the ladder, and that was the main
2 thing. Again, we probably talked about how this
3 thing is going to come down. It was a big, big
4 limb. And it stuck -- stuck out quite a ways and
5 had a lot of small twigs, little limbs on the end
6 of it. You know, it sort of umbrella'd out and
7 --

8 Q. Okay. So you two set the ladder up, and you
9 talked about how the limb would come down. What
10 else happened?

11 A. I don't know. We may have talked about news of
12 the day or something. It's hard telling.

13 Q. That's fine.

14 A. And I don't remember.

15 Q. You got to work; is that right?

16 A. Yeah.

17 Q. Were you at the top of the ladder?

18 A. Pretty much.

19 Q. Okay.

20 A. I actually got off on a limb. Because they were
21 so big and a lot of limbs up there, so I had
22 plenty of space to actually get on a limb and --

23 Q. You actually sat on it?

24 A. -- do the cutting? Yeah.

25 Q. Okay. So you were working at the top of the

DEPOSITION OF LEE LAMBRIGHT

-31-

1 Q. Did you ever climb down the ladder and get back
2 up a second time?

3 A. I don't believe so.

4 Q. Okay. So you stayed up there the whole time
5 until the branch came down and hit Tommy?

6 A. Yeah.

7 Q. Okay.

8 A. No, it didn't hit him when it first came down.

9 Q. Okay. And can you explain that to me?

10 A. Well, the branch had so much weight on the
11 outside, over here towards this house.

12 Q. Okay.

13 A. You know, the branch came out here like this; and
14 it was big, a lot of -- a lot of twigs and stuff.
15 So when I cut about halfway through that 8 to 10
16 inch limb, it broke because of the weight out on
17 the end; and it came straight down and it rested
18 against the ladder, the ladder and the tree. And
19 it stood straight up, the limb of the tree was
20 sticking straight up. And it was resting on the
21 ground on all those twigs and branches. Okay?
22 So at that point, when I was still up there, I
23 cut the -- I cut the remaining bottom half of the
24 limb off, and it continued to stand straight up
25 against that ladder and the tree.

DEPOSITION OF LEE LAMBRIGHT

-33-

1 A. Well, he actually -- he actually was about right
2 in here, I would say.

3 Q. And could you put an arrow showing where he would
4 have walked when you were --

5 A. Well, this is back about 30 feet. This is back
6 this way a ways, so he would have -- he would
7 have walked over in there. So why he walked
8 over, I have no idea; and I don't think anybody
9 else does, you know, as far as I know.

10 Q. Did he walk closer to the branch?

11 A. No, no. He actually -- actually, walked closer
12 to the house. But anyway, that branch was so
13 long, it -- when I walked in and tip it out,
14 that's when it hit him.

15 Q. Okay. Just so I understand this right, the
16 branch was separated but still leaning against
17 the main tree trunk; is that right?

18 A. Correct.

19 Q. And you walked underneath the branch, between the
20 tree --

21 A. Well, sort of around it.

22 Q. Okay. You walked around the branch, close to the
23 tree trunk, and actually pushed the branch
24 forward; is that right?

25 A. Correct.

DEPOSITION OF LEE LAMBRIGHT

-57-

1 Q. Okay. So you talked to them, and then you came
2 back; and at that point you went in and you
3 pushed the limb over?

4 A. Right.

5 Q. And I believe when you described doing it the
6 first time, you said "tip out." When you said
7 "tip out," did you just mean push over?

8 A. Yeah, yeah.

9 Q. Okay. Now, prior to, I guess -- you said when
10 you went to push the tree over, you couldn't see
11 very well?

12 A. Right.

13 Q. Did you yell out or anything that you were about
14 to push it over?

15 A. No. I don't remember yelling.

16 Q. Could you see where the other people were once
17 you were up there to push the branch over?

18 A. I'm not sure if I could have or not, but I really
19 didn't look to see if they had moved from the
20 positions that they were in when I walked back
21 there. And I probably could have peered through
22 there somehow and just to get a little glimpse to
23 make sure that they were still over there where
24 they were, but --

25 Q. All right. And what type of cut did you make on

1 the branch initially? Were you trying to do
2 directional cutting, or did you just do a basic
3 type cut?

4 A. Just a straight cut, you know.

5 Q. Did you have any idea where the limb was going to
6 fall?

7 A. Well, yeah, yeah. They were all off to the side
8 when I first made the cut, but I didn't expect it
9 to stand up like that, you know. And I figured
10 it would just fall right down on the ground, so
11 --

12 Q. So, basically, if I'm getting this right, when
13 you were cutting, about halfway through the
14 branch cracked and the bottom half of it kind of
15 kept it attached?

16 A. Yeah. It -- it was hanging pretty much straight
17 down and it splintered, you know, the bottom part
18 like -- I don't know if you've ever seen a tree
19 cut like that, but it gets a lot of odd shape
20 ends to it and, you know, it gets pretty sharp.
21 That's the part that, I guess, ended up hitting
22 him in the head.

23 Q. Okay. Were there any physical barriers to keep
24 people away from the tree?

25 A. No.



1 Hobbs in those five minutes?

2 A. No.

3 Q. Did he have a chainsaw going?

4 A. Yes.

5 Q. Was it a tall ladder?

6 A. Yes.

7 Q. So did he seem sort of separated from you and Mr.
8 Hobbs?

9 A. Yes.

10 Q. Okay. And that wasn't the kind of situation
11 where you two would talk back and forth? He just
12 kept cutting with a chainsaw. Is that right?

13 A. Right.

14 Q. Okay. And in those five minutes that you were
15 removing limbs, what did you see Tommy do, Mr.
16 Hobbs?

17 A. He was pulling limbs. We both were.

18 Q. Okay. And where was he pulling limbs from?

19 A. Underneath that tree.

20 Q. Okay. And so the pile of limbs where Tommy was
21 moving, was actually located until the branches
22 and under the tree; is that right?

23 A. Right.

24 Q. Okay. And as Mr. Lambright was sawing down
25 limbs, Tommy was walking underneath the tree and

DEPOSITION OF DAVID LAPPIN

-37-

1 tree; is that right?

2 A. Yes.

3 Q. Okay. And were you facing the tree also?

4 A. Yes.

5 Q. And were you to Mr. Hobbs left?

6 A. Yes.

7 Q. And he was to your right?

8 A. Yes.

9 Q. And what was the distance between you two?

10 A. Maybe 8 or 10 feet.

11 Q. Okay. So he was about 8 or 10 feet to your
12 right?

13 A. Yes.

14 Q. Okay. And what was the distance between Mr.
15 Hobbs and the tree, do you think?

16 A. Probably 15 feet.

17 Q. Okay. Was Mr. Hobbs standing -- excuse me -- was
18 Mr. Hobbs standing as far away as possible from
19 the tree?

20 A. We were both dragging limbs at the time.

21 Q. Okay.

22 A. And that's where we -- because we were both
23 dragging, and that's where we were when the limb
24 fell.

25 Q. Okay. And it looks like there was some distance

DEPOSITION OF DAVID LAPPIN

-38-

1 between Mr. Hobbs and the condo. Is that right?

2 A. Yes.

3 Q. Okay. What do you think that distance was?

4 A. Ten feet, maybe.

5 Q. Okay. So he was not standing all the way against
6 the condo when the limb fell and hit him; is that
7 right?

8 A. No.

9 Q. Okay. Do you agree he could have been standing
10 close to the condo?

11 A. Well, we were -- we were dragging limbs. I mean
12 at that time he wasn't.

13 Q. Okay, okay. And it looks like there -- let me
14 strike that question. Okay. So I understand
15 you're standing about 5 to 8 feet beside Mr.
16 Hobbs.

17 A. Yes.

18 Q. And the limb begins to fall, and you tell him to
19 watch out. What happens next, in your own words?

20 A. I yell to Tommy to move, and within seconds I --
21 I guess he just looked up and that's -- the limb
22 just -- just hit him. Because it was -- by the
23 time I saw it falling and yelling, I mean, it was
24 right on him.

25 Q. Okay. And the base of that limb flipped over and

DEPOSITION OF BENNY ROPER

-24-

1 who hired Lambright; is that right?

2 A. That's correct.

3 Q. Do you know if Mr. Lambright had any license or
4 insurance or if his work was bonded?

5 A. None, to my knowledge.

6 Q. Okay. Is Mr. Lambright a personal friend of Mr.
7 Hobbs?

8 A. Yes, sir.

9 Q. And do you know why Mr. Lambright was hired
10 instead of a professional tree trimmer?

11 A. No, sir. I do not.

12 Q. Okay.

13 A. I was told it would be Mr. Brilar that was a
14 professional tree trimmer when I told him I
15 needed some limbs removed. That's -- they told
16 me that's -- Tommy told me he'd get Mr. Brilar.

17 Q. When did Mr. Hobbs promise you that a
18 professional tree trimmer would be hired?

19 A. When I told him at the time, that I told him
20 those limbs needed trimmed to keep them off my
21 deck.

22 Q. Do you know what month that was?

23 A. It was two days before the accident.

24 Q. Okay. So two days before this accident Mr. Hobbs
25 told you that he would hire a professional tree

1 trimmer to take care of the branch?

2 A. Yes, sir.

3 Q. And when you showed up the day the branch was
4 being removed, it was Mr. Hobbs and Mr. Lambright
5 removing the branch?

6 A. Yes, sir.

7 Q. Okay. And do you know why the professional tree
8 trimmer was not hired?

9 A. No, sir; I don't.

10 Q. Okay.

11 A. I do know that this past year Mr. Brilar, which
12 is a professional tree trimmer, was hired to
13 remove some dead limbs; and this was in June or
14 May, late May or early June. And he came and
15 started work and Ms. Massingale, which was the
16 treasurer, got mad because he cut a tree limb
17 that was green behind her place and fired him.
18 Paid him the full amount and run him off and paid
19 him \$1125.

20 Q. Okay. So Mr. Brilar had showed up on the
21 property to remove limbs in 2014.

22 A. Yes, sir.

23 Q. But in 2012, the time of this accident, Mr. Hobbs
24 and Lambright were the two folks removing the
25 branch; is that right?

DEPOSITION OF BENNY ROPER

-38-

1 going on? What did you see?

2 A. I seen Mr. Lambright on the ladder, cutting limbs
3 up here. Tommy, he was down here and then he was
4 over there. I'm thinking that they threw a rope
5 with a drop tied to it around that limb to pull
6 down where they'd know which one to cut. But,
7 you know, I wasn't expecting this to happen, and
8 I wasn't really paying attention to what was
9 happening. At this time I -- when the accident
10 actually happened, Mr. Lappin had just got there;
11 and he was talking to Tommy. And I was right
12 here, and I just happened to be watching when Mr.
13 Lambright cut that limb that was right here. I'm
14 going to mark this limb. There was another limb
15 under it that had been cut, that hadn't fell to
16 the ground. It still liked this much being cut
17 and hanging down, and you can see that clearly if
18 you look at those limbs that were cut. But when
19 he cut this bigger limb right here on top, it
20 fell down on the smaller limb that hadn't fell
21 and both limbs at that time came down; and Tommy
22 was under them when they came down. I seen
23 Lappin run over there to Tommy, and I knew
24 something was wrong. I came out the front door
25 and came around the side of my house. And at

1 A. Better areas, yes, sir.

2 Q. Safer areas?

3 A. Yes, sir.

4 Q. Could he have been closer to your condo or down
5 in the meadow or closer to the --

6 A. He couldn't have got no closer to the condo.

7 Q. Okay.

8 A. Now, he could have been stood out here a little
9 further or stood over here or stood back here;
10 but, you know, he was in direct line of fire.

11 Q. So do you think that Mr. Hobbs was, in your
12 words, in the direct line of fire underneath the
13 branch?

14 A. Yes, sir.

15 Q. And you don't think that was a smart place to
16 stand?

17 A. No, sir.

18 Q. And there were safer places that he could have
19 been standing?

20 A. Yes, sir.

21 Q. Okay. Let me ask you this; who do you think is
22 responsible for this accident?

23 A. Mr. Lambright, but I think -- well, I think
24 Tommy's in the wrong place at the wrong time, and
25 Mr. Lambright is the one that cut the limb.

damaged or destroyed portions of the property to as good condition as formerly. All such insurance proceeds shall be deposited in a bank or other financial institution, the accounts of which bank or institution are insured by a Federal governmental agency, with the provisions agreed to by said bank or institution that such funds may be withdrawn only by signature of at least one-third (1/3) of the members of the Board of Directors, or by an agent duly authorized by the Board of Directors. The Board of Directors shall obtain bids from at least two reputable contractors, and then may negotiate with any such contractor, who may be required to provide a full performance bond for the repair, reconstruction or rebuilding of such building or buildings.

(10) Also, the Association may levy in any calendar year, a special assessment for the purpose of defraying the cost of construction, reconstruction, repair or replacement of a building or buildings containing single family residential units, to the extent that insurance proceeds under a group insurance policy containing a Replacement Cost Endorsement are insufficient to pay all costs of said construction, reconstruction, repair or replacement to as good condition as prior to damage or destruction by fire or other casualty covered by said insurance.

(11) The reconstructed or repaired residence shall be substantially identical to the destroyed residence, unless a change shall be approved by the Board, and shall be constructed in conformity with plans submitted to and approved by the Board prior to construction.

(12) If a dwelling is not habitable by reason of damage, the obligation of the owner to pay annual assessment installments shall be suspended either for a period of ninety (90) days or until the dwelling is restored to a habitable condition, whichever shall first occur. In the event a dwelling is damaged or destroyed, and the owner does not begin repair or reconstruction within thirty (30) days following the damage or destruction, he shall remove or cause to be removed, at his expense, all debris from the lot, so that it shall be placed in a neat, clean and safe condition; and if he fails to do so, the Association may cause the debris to be removed, and the cost of removal shall constitute a lien upon the dwelling until paid by the owner, unless the dwelling is thereafter acquired by the Association.

Section 12. Common Area Maintenance. Common Areas shall be the responsibility of the Association, which shall maintain the parking lots, grounds and common buildings. The Association shall make such capital improvements to common areas as the shareholders may determine to be in the best interest of Fairway Oaks Townhouses. The Association shall maintain liability insurance for the common areas.

Section 13. Exterior Maintenance of Buildings. In addition to maintenance of the common area, the Association shall provide

shall be conclusive evidence of any assessment therein stated to have been paid.

ARTICLE X

Director's Meetings

Section 1. The annual meeting of the Board of Directors shall be held at the discretion of the Board of Directors with ample notice given to each member.

Section 2. Ten (10) days written notice of such annual meeting shall be given each Director.

Section 3. The transaction of any business at any meeting of the Board of Directors, however called and noticed, or whenever held, shall be as valid as though made at a meeting duly held after regular call and notice if a quorum is present, and, if either before or after the meeting, each of the Directors not present signs a written waiver of notice, or consent to the holding of such a meeting, or an approval of the minutes thereof. All such waivers, consents, or approvals shall be filed with the corporate records and made part of the minutes of the meeting.

Section 4. The majority of the Board of Directors shall constitute a quorum thereof.

ARTICLE XI

Officers

Section 1. The officers shall be president, a vice-president, a secretary, a treasurer. Any or all officers may be but shall not be required to be members of the Board of Directors.

Section 2. The officers shall be chosen by a majority of the Directors.

Section 3. All officers shall hold office during the pleasure of the Board of Directors.

Section 4. The president shall preside at all meetings of the Board of Directors, shall see that orders and resolutions of the Board of Directors are carried out and sign all notes, checks, leases, mortgages, deeds and all other written instruments.

Section 5. The vice-president shall perform all the duties in the absence of the president.

Section 6. The secretary shall be ex officio the secretary of the Board of Directors, shall record the votes and keep the

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No.: 2014-CP-39-00613

Charles Thomas Hobbs and Mary
Hobbs,

Appellants,

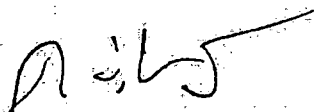
v.

Fairway Oaks Homeowners
Association,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all
material proposed to be included by any of the parties and not any other material.



Raymond T. Wooten (S.C. Bar # 81483)
SMITH, JORDAN & LAVERY, PA
1810 East Main Street
Post Office Box 1207
Easley, South Carolina 29641-1207
(864) 855-1661 office
(864) 855-1685 fax
Wooten@SmithJordan.com
Attorney for Appellants

Easley, South Carolina
Date: June 30, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No.: 2014-CP-39-00613

Charles Thomas Hobbs and Mary
Hobbs,

Appellants,

v.

Fairway Oaks Homeowners
Association,

Respondent.

SUPPLEMENTAL RECORD ON APPEAL

ATTORNEY FOR APPELLANT:

Raymond T. Wooten
(S.C. Bar # 81483)
Smith, Jordan & Lavery, P.A.
P.O. Box 1207
Easley, SC 29641
(864) 855-1661
wooten@smithjordan.com

ATTORNEYS FOR RESPONDENT:

J.R. Murphy and Wesley B. Sawyer
Murphy and Grantland
P.O. Box 6648
Columbia, SC 29260
(803)454-1237

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No.: 2014-CP-39-00613

Charles Thomas Hobbs and Mary
Hobbs,

Appellants,

v.

Fairway Oaks Homeowners
Association,

Respondent.

SUPPLEMENTAL RECORD ON APPEAL

ATTORNEY FOR APPELLANT:

Raymond T. Wooten
(S.C. Bar # 81483)
Smith, Jordan & Lavery, P.A.
P.O. Box 1207
Easley, SC 29641
(864) 855-1661
wooten@smithjordan.com

ATTORNEYS FOR RESPONDENT:

J.R. Murphy and Wesley B. Sawyer
Murphy and Grantland
P.O. Box 6648
Columbia, SC 29260
(803)454-1237

INDEX

Transcript of Deposition of Lee Lambright on November 19, 2014

- a. Direct Examination by Elliott B. Daniels p. 17.....176A
- b. Direct Examination by Elliott B. Daniels p. 29.....180A
- c. Direct Examination by Elliott B. Daniels p. 32.....181A
- d. Direct Examination by Elliott B. Daniels p. 34.....182A
- e. Cross-Examination by Raymond T. Wooten p. 59.....184A

DEPOSITION OF LEE LAMBRIGHT

-17-

1 so he said, "Well, I'll help you." So -- so we
2 just set up a time to go cut it.

3 Q. Okay. So he asked you to do a tree project, and
4 you tell him that you would need a second hand;
5 and he said I'll be that second hand and help
6 you?

7 A. Yeah.

8 Q. And was he there that day to help you, to be that
9 second hand?

10 A. Right.

11 Q. Is that correct?

12 A. Yes.

13 Q. Okay. And did you tell them that you owned a
14 chainsaw, that you owned a conventional saw; or
15 how did that conversation go?

16 A. I really don't recall.

17 Q. You just told him you could get the limb down?

18 A. You know, I guess, I let him know somehow I had a
19 saw --

20 Q. Okay.

21 A. -- to do it with.

22 Q. Did you use any of Mr. Hobbs' equipment that day?

23 A. No.

24 Q. Whose ladder did you use?

25 A. My own.

DEPOSITION OF LEE LAMBRIGHT

-29-

1 ladder. Was Tommy working underneath the ladder?

2 A. No. He was standing off to the side.

3 Q. What was he doing while you began to take the
4 branches down?

5 A. As far as I know, he was standing off to behind
6 me.

7 Q. And is that closer to Benny Roper's condo?

8 A. No. It was more to the left.

9 Q. Okay.

10 A. Benny's condo was more to the south and --

11 Q. I have a photograph here of, I think, what shows
12 the accident scene. Do you recognize that?

13 A. Yeah.

14 Q. Okay.

15 A. Yeah.

16 Q. And we'll mark this Exhibit No. 1. Can you point
17 to me where you indicated to the west where Tommy
18 Hobbs was standing as he began to --

19 A. It would be out this direction.

20 Q. Okay. And there's a Sharpie right here. Could
21 you make a mark where you think Tommy was
22 standing before the tree limb came down?

23 A. About in here somewhere.

24 Q. Okay. Could you make a -- just make an "X", just
25 to make it a little bit darker?

1 Q. Okay.

2 A. Okay? And then I'd come down, and I walked out
3 here. And by this time, the landscaper was
4 there, the guy that does the mowing.

5 Q. Is that Daniel Lappin?

6 A. Yeah, he and his helper Ray. They were standing
7 over here in this area where I have marked for
8 Tommy.

9 Q. Okay.

10 A. And so we stood there and talked a little bit.
11 Just what we talked about, I'm not sure. But
12 anyway, this tree limb was standing, still
13 standing up against this ladder and the tree.
14 Okay. So to get it down, it had to be tipped out
15 towards the house. And so I -- these guys were
16 all standing over in here, I would say, at least
17 25 to 30 feet away from where the limb was
18 standing up against the tree. And I walked in
19 behind that big limb to tip it out, to get it on
20 the ground. And it was so thick in there, that
21 when I -- I never saw Tommy move. I thought he
22 was still over here on the side, but apparently
23 he walked -- well, he had to. He walked in
24 there.

25 Q. Can you put an arrow towards where he walked --

DEPOSITION OF LEE LAMBRIGHT

-34-

1 Q. And then like a long arch, it tipped over?

2 A. Correct.

3 Q. And that's when the branch fell and hit Tommy
4 Hobbs in the head?

5 A. Yeah. That splintered end hit him on the top of
6 the head.

7 Q. And was it the end that was attached to the tree
8 trunk?

9 A. Yeah.

10 Q. Okay. So it sort of did a somersault when you
11 pushed it and hit him on top of the head; is that
12 right?

13 A. Yeah.

14 Q. Okay.

15 A. Yeah. It just sort of flipped on out.

16 Q. At the time of the accident, when you pushed the
17 branch forward and it hit Mr. Hobbs, how far
18 apart was Tommy Hobbs and Daniel Lappin standing?

19 A. I would guess at least 20 feet.

20 Q. Okay. So there was 20 feet between Lappin and
21 Hobbs. Could you see where they were standing
22 through all the branches when you pushed the tree
23 forward?

24 A. Not really, but --

25 Q. Were the tree branches and leaves blocking your

DEPOSITION OF LEE LAMBRIGHT

-59-

1 Q. And was there anybody like working with you to
2 make sure nobody was in the way?

3 A. No.

4 Q. And you said that you think the only thing that
5 the HOA did wrong was not hiring a professional.
6 What do you think would have been done
7 differently if they had hired a professional?

8 A. Who knows, I don't know. They probably would
9 have come with a boom truck that has a lift on
10 it. And those guys, they tend to cut pieces,
11 like they may have cut part of the limb out on
12 the end and worked back towards the main trunk of
13 the tree. I'm just guessing that they could have
14 done that. And they may have just cut the whole
15 thing off like I tried to do, but --

16 Q. Do you think that they would have had somebody
17 there on the ground to keep people out, to keep
18 people away from the danger --

19 A. Well, they -- you know, they do that stuff every
20 day. And they get hurt too occasionally, just
21 had a guy in Easley about a year ago got killed
22 by a falling tree or a limb. You probably heard
23 about that, that Gantt. Yeah, it's a -- it's
24 dangerous work, no doubt about it.

25 Q. Did you actually see the limb hit Tommy?

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No.: 2014-CP-39-00613

Charles Thomas Hobbs and Mary
Hobbs,

Appellants,

v.

Fairway Oaks Homeowners
Association,

Respondent.

FINAL INITIAL BRIEF OF APPELLANT

Raymond T. Wooten (S.C. Bar # 81483)
SMITH, JORDAN & LAVERY, PA
1810 East Main Street
Post Office Box 1207
Easley, South Carolina 29641-1207
(864) 855-1661 office
(864) 855-1685 fax
Wooten@SmithJordan.com
Attorney for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No.: 2014-CP-39-00613

Charles Thomas Hobbs and Mary
Hobbs,

Appellants,

v.

Fairway Oaks Homeowners
Association,

Respondent.

FINAL INITIAL BRIEF OF APPELLANT

Raymond T. Wooten (S.C. Bar # 81483)
SMITH, JORDAN & LAVERY, PA
1810 East Main Street
Post Office Box 1207
Easley, South Carolina 29641-1207
(864) 855-1661 office
(864) 855-1685 fax
Wooten@SmithJordan.com
Attorney for Appellants

TABLE OF CONTENTS

Table of Authorities.	ii
Statement of Issues on Appeal.	1
Statement of Case.	2
Arguments:	
Standard of Review	6
I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS RESPONDENT HAD A NONDELEGABLE DUTY OF REASONABLE CARE WHEN MAKING REPAIRS OR IMPROVEMENTS, INCLUDING WHEN MAINTAINING TREES IN ITS COMMON AREA, SUCH THAT IT IS LIABLE FOR THE NEGLIGENT ACTIONS OF ITS INDEPENDENT CONTRACTOR . . 7	
a. Respondent owed an absolute duty to Appellant Tommy Hobbs so that it remains liable for the negligence of its independent contractor just as if the independent contractor were an employee.	8
b. A nondelegable duty exists in other similar circumstances such as the landlord-tenant context.	10
c. Appellant Tommy Hobbs, as a member of Fairway Oaks, was considered an invitee in Fairway Oaks's common area, and South Carolina has recognized a nondelegable duty in other similar cases where the injured party had the same or a lesser status than Appellant Tommy Hobbs had as an invitee. . . 13	
d. Courts in other states who have ruled on similar issues have determined that homeowners associations have nondelegable duties to their members in circumstances similar to the present case.	14
Conclusion.	18

TABLE OF AUTHORITIES

CASES

<u>Affan v. Portofino Cove Homeowners Association</u> 189 Cal. App. 4 th 930 (2010 Cal. App. 4 th).....	15, 16
<u>Brockbank v. Best Capital Corp.</u> , 341 S.C. 372, 534 S.E.2d 688 (2000).....	6
<u>Durkin v. Hansen</u> , 313 S.C. 343, S.E.2d 550 (Ct. App. 1993).....	9, 10, 11, 12, 13, 14, 19
<u>Estate of Adair v. L-J, Inc.</u> , 372 S.C. 154, 641 S.E.2d 63 (Ct. App. 2007).....	6
<u>Frances T. v. Vill. Green Owners Assn.</u> , 42 Cal. 3d 490, 499-500 (1986).....	16
<u>Gazo v. City of Stamford</u> , 255 Conn. 245, 765 A.2d 505 (2001).....	17, 18
<u>Hoover v. Broome</u> , 324 S.C. 531, 479 S.E.2d 62 (Ct. App. 1996).....	14
<u>J.T. Baggerly v. CSX Transp., Inc.</u> , 370 S.C. 362, 635 S.E.2d 97 (2006) (internal citations omitted).....	6
<u>Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc.</u> , 317 S.C. 200, 452 S.E.2d 619 (Ct. App. 1994) (internal citation omitted).....	13
<u>Moon v. Homeowners' Ass'n of Sibley Forest, Inc.</u> , 202 Ga. App. 821, 415 S.E.2d 654, (1992).....	16, 17
<u>Parker v. Stevenson Oil Co.</u> , 245 S.C. 275, 140 S.E.2d 177 (1965).....	14
<u>Pittman v. Grand Strand Entertainment, Inc.</u> , 363 S.C. 531, 611 S.E.2d 922 (2005).....	7
<u>Robinson v. Estate of Harris</u> , 389 S.C. 360, 698 S.E.2d 801 (2010).....	6
<u>Rock Hill Telephone Co. v. Globe Communications, Inc.</u> , 363 S.C. 385, 611 S.E.2d 235 (2005) (internal citations omitted).....	8, 9, 10, 18
<u>S. Carolina Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC</u> , 379 S.C. 645, 667 S.E.2d 7 (Ct. App. 2008) (citations omitted).....	6
<u>S. Carolina Nat. Gas Co. v. Phillips</u> , 289 F.2d 143, 148 (4th Cir. 1961).....	14

<u>Simmons v. Tuomey Regional Medical Center</u> , 330 S.C. 115, 498 S.E.2d 408 (Ct. App. 1998).....	9, 10, 11, 14
<u>Sims v. Giles</u> , 343 S.C. 708, 541 S.E.2d 857 (Ct. App. 2001).....	13
<u>Sumner v. Carpenter</u> , 328 S.C. 36, 492 S.E.2d 55 (1997).....	6
<u>Vasquez v. Lago Grand Homeowners Association</u> 900 So.2d 587, Foot Note 7.....	16
<u>Wright v. PRG Real Estate Mgmt., Inc.</u> , 413 S.C. 276, 775 S.E.2d 399,(Ct. App. 2015), <u>reh'g denied</u> (Aug. 20, 2015).....	14

COURT RULES

Rule 56, <i>South Carolina Rules of Civil Procedure</i>	6
---	---

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err by granting Respondent Fairway Oaks Homeowners Association's motion for summary judgment, on the basis that because Lee Lambright was an independent contractor, Respondent Fairway Oaks is not liable for Lambright's negligence, and that Respondent Fairway Oaks did not owe Appellants a nondelegable duty when performing maintenance and repairs in its common area?

STATEMENT OF CASE

The pertinent facts for this appeal are not in dispute. Appellant Charles Thomas Hobbs ("Tommy Hobbs") was struck in the head by a tree limb on August 21, 2012. (R. p. 12, 16) (See Summons and Complaint, pg. 3; Answer, pg. 1). Tommy suffered memory loss as a result of the accident and does not recall the events that occurred on August 21, 2012. (R. p. 166, lines 12-14) (See Deposition of Tommy Hobbs, pg. 31, ll. 12-14). The accident occurred on the common areas of the Fairway Oaks Townhome development which was owned by Respondent Fairway Oaks Homeowners Association ("Fairway Oaks"). (R. p. 11, 16) (See Summons and Complaint, pg. 2; Answer, pg. 1). Pursuant to the Declaration of Covenants and Restrictions for Fairway Oaks Townhouses, Easley, South Carolina and Provisions for Fairway Oaks Homeowners' Association ("Covenants and Restrictions"), Respondent was responsible for maintaining the common areas. The Covenants and Restrictions provide: "Section 12. Common Area Maintenance. Common Areas shall be the responsibility of the Association, which shall maintain the parking lots, grounds and common buildings. The Association shall make such capital improvements to common areas as the shareholders may determine to be in the best interest of Fairway Oaks Townhouses. The Association shall maintain liability insurance for the common areas." (R. p. 193) (See Covenants and Restrictions, Article VI, Section 12, pg. 18). Appellant Tommy Hobbs was the President of Respondent at the time of his accident, and he had been for many years. (R. p. 158, lines 16-19) (See Deposition of Tommy Hobbs, pg. 15, ll. 16-19). Appellant Tommy Hobbs' duties as president were set forth in Respondent's By-Laws which provide that "The president shall preside at all meetings of the Board of Directors, shall see that orders and

resolutions of the Board of Directors are carried out and sign all notes, checks, leases, mortgages, deeds and all other written instruments.” (R. p. 194) (Bylaws, Article XI, Section 4, pg. 6). In his role as President of Respondent, Appellant Tommy Hobbs hired Lee Lambright to remove a tree limb located on Respondent’s common area that was damaged. (R. p. 176, line 18-p. 176a, line 7) (See Deposition of Lee Lambright, pg. 16, l. 18 – pg. 17, l. 7). Lambright was a local handyman who performed various jobs for Respondent and the residents of Fairway Oaks. (R. p. 172, lines 11-18; R. p. 173, line 12-p. 174, line 12) (See Deposition of Lee Lambright, pg. 12, ll. 11-18; pg. 13, l. 12 – pg.14, l. 12). It is undisputed that Lambright was an independent contractor of Respondent. Lambright asked Appellant Tommy Hobbs to help him carry a ladder to the site where the tree limb would be cut as the ladder was too large for him to handle by himself. (R. p.176, line 18-p. 176a, line 2) (See Deposition of Lee Lambright, pg. 16, l. 18 – pg. 17, l. 2). Tommy agreed, and on August 21, 2012 did in fact assist Lambright in taking the ladder to the job sight and setting it up. (R. p. 178, lines 14-16) (See Deposition of Lee Lambright, pg. 25, ll. 14-16). After getting the ladder set up, Lambright began to work on the tree limb. (R. p. 179, lines 20-22) (See Deposition of Lee Lambright, pg. 26, ll. 20-22). There were several witnesses who have provided differing accounts of what Appellant Tommy Hobbs was doing as Lambright worked on the tree.

- a. Lambright testified that Appellant Tommy Hobbs was standing off to the side. (R. p. 180, line 25-p. 180a, line 6) (See Deposition of Lee Lambright, pg. 28, l. 25- pg. 29, l. 6)

- b. Benny Roper testified that Appellant Tommy Hobbs was talking to David Lappin. (R. p. 191, lines 9-11) (See Deposition of Benny Roper, pg. 38, ll. 9-11).
- c. David Lappin, Respondent's landscaper at the time, testified that Appellant Tommy Hobbs was pulling branches out from underneath the tree. (R. p. 186, lines 14-19) (See Deposition of David Lappin, pg. 28, ll. 14-19)

Lambright cut a large tree limb, however the limb did not fall all the way to the ground, and was leaning against the tree. After cutting the tree limb, Lambright climbed down and spoke with Appellant Tommy Hobbs and Daniel Lappin. Lambright then went back to the tree and pushed the already cut limb over. The limb struck Appellant Tommy Hobbs in the head. (R. p. 181, line 4-p. 181a, line 24; R. p. 182, line 22-p. 182a, line 13) (See Deposition of Lee Lambright, pg. 31, l. 4- pg. 32, l. 24; pg. 33, l. 22- pg. 34, l. 13). Lambright took no safety precautions, provided no warnings and did not look to make sure everyone was out of the way immediately prior to pushing over the tree limb while cutting and removing the tree limb. (R. p. 183, lines 13-24; R. p. 184, line 23-p. 184a, line 3) (See Deposition of Lee Lambright, pg. 57, ll. 13-24; pg. 58, l. 23 – pg. 59, l. 3).

Appellants filed suit against Respondent on May 19, 2014 asserting that Respondent, acting through Lambright, was negligent. (R. pp. 10-15) (See Summons and Complaint). Appellant Mary Hobbs also asserted a claim for loss of consortium. (R. pp. 10-15) (See Summons and Complaint). On August 7, 2015, the Honorable Edward W. Miller, heard Fairway Oaks' Motion for Summary Judgment, and issued an Order Granting Summary Judgment to Defendant Fairway Oaks which was filed on September

23, 2015. (R. pp. 3-7; R. pp. 137-157) (See Order Granting Summary Judgment; See also Hearing Transcript). The trial court's order held that Fairway Oaks was not liable for the actions of Lambright because he was an independent contractor. (R. pp. 3-7) (See Order Granting Summary Judgment). On or about October 2, 2015, Appellants filed a Motion to Alter or Amend Judgment Pursuant to Rule 59, *SCRCP*. (R. pp. 109-124) (See Motion for Reconsideration). On or about November 17, 2015, the trial court issued an Order Denying Appellants' Motion for Reconsideration. (R. pp. 8-9) (See Order Denying Motion for Reconsideration).

Appellants therefore respectfully appeal the trial court's grant of summary judgment, and/or its denial of Appellants' motion for reconsideration of same.

ARGUMENTS

STANDARD OF REVIEW

On appeal from the grant of summary judgment, the appellate courts apply the same standard as that required for the circuit court under Rule 56(c), SCRCP. Robinson v. Estate of Harris, 389 S.C. 360, 367-68, 698 S.E.2d 801, 805 (2010), citing Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Robinson, supra, citing Rule 56(c), SCRCP. “Questions of law may be decided with no particular deference to the trial court.” S. Carolina Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008) (citations omitted). Further, when reviewing a novel question of law, the Court is “free to decide the issue with no particular deference to the lower court.” J.T. Baggerly v. CSX Transp., Inc., 370 S.C. 362, 372, 635 S.E.2d 97, 102-03 (2006) (internal citations omitted).

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997); Rule 56(c), SCRCP. On appeal, when factual matters are in dispute, all ambiguities, conclusions, and inferences arising in and from the evidence must be viewed in a light most favorable to the non-moving party. Estate of Adair v. L-J, Inc., 372 S.C. 154, 156, 641 S.E.2d 63, 64 (Ct. App. 2007), citing

Pittman v. Grand Strand Entertainment, Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005).

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS RESPONDENT HAD A NONDELEGABLE DUTY OF REASONABLE CARE WHEN MAKING REPAIRS OR IMPROVEMENTS, INCLUDING WHEN MAINTAINING TREES IN ITS COMMON AREA, SUCH THAT IT IS LIABLE FOR THE NEGLIGENT ACTIONS OF ITS INDEPENDENT CONTRACTOR

In its Order Granting Summary Judgment to Defendant Fairway Oaks Homeowners Association, the trial court held that “Defendant is not liable for the negligence of an independent contractor that Plaintiff, as the president of the HOA, hired, and no recognized exception to the general independent contractor rule applies. Accordingly, Defendant is entitled to judgment as a matter of law.” (R. p. 5) (See Order Granting Summary Judgment, p. 2). The trial court’s Order Granting Summary Judgment further states “[n]onetheless, the general rule applies: Defendant is not liable for the negligence of Lambright because Lambright was an independent contractor...The general independent contractor rule applies here: ‘an employer is not liable for the torts of an independent contractor...Because Lambright is an independent contractor, Defendant is not liable for Lambright’s negligence.” (R. p. 6) (See Order Granting Summary Judgment, p. 3). The trial court’s Order Granting Summary Judgment also states that “there is no recognized exception in South Carolina that removes this case from the general independent contractor rule. To find otherwise would require this court to expand the existing body of case law. Because there is no recognized exception to the general independent contractor rule, Defendant is entitled to judgment as a matter of law.” (R. p. 7) (See Order Granting Summary Judgment, p. 4). At the motion for summary judgment hearing, the trial judge stated that “I am not, I think, in a position to

expand the scope of exception to the rule. And so I'm going to grant their motion for summary judgment, which is not what I normally do." (R. p. 156, lines 2-5) (Hearing Transcript, p. 20, ll. 2-5).

Respectfully, Appellants submit that the trial court erred in ruling that Respondent did not have a nondelegable duty for the actions of its independent contractor when maintaining its common areas, because this nondelegable duty was not already recognized. The matter before the trial court was a novel issue of law. Because this was a novel issue of law, the trial court was expanding the existing body of case law whether it found that a nondelegable duty existed or found that a nondelegable duty did not exist. Appellants submit that the general rule that a principal is not liable for the torts of its independent contractor is not applicable as Respondent had a nondelegable duty of reasonable care when making repairs or improvements, including when maintaining trees in its common area, so that it is liable for the negligent actions of its independent contractor.

a. Respondent owed an absolute duty to Appellant Tommy Hobbs so that it remains liable for the negligence of its independent contractor just as if the independent contractor were an employee.

It is true that "[t]he general rule is that an employer is not vicariously liable for the negligent acts of an independent contractor." Rock Hill Telephone Co. v. Globe Communications, Inc., 363 S.C. 385, 390, 611 S.E.2d 235, 238 (2005) (internal citations omitted). However, "[a]n exception to the general rule is that '[a] person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an

employee.”” Id. (internal citations omitted). Here, Respondent’s Covenants and Restrictions created an affirmative duty to maintain Respondent’s common area. The Covenants and Restrictions provide in pertinent part:

“Section 12. Common Area Maintenance. Common Areas shall be the responsibility of the Association, which shall maintain the parking lots, grounds and common buildings. The Association shall make such capital improvements to common areas as the shareholders may determine to be in the best interest of Fairway Oaks Townhouses. The Association shall maintain liability insurance for the common areas.” (R. p. 193)

(Covenants and Restrictions, Article VI, Section 12, pg. 18)

Lambright was hired by Respondent to carry out its duty to maintain its common areas, and was performing this function when he injured Appellant Tommy Hobbs.

In an analogous situation, this Court has previously determined that performing maintenance pursuant to contractual requirements is an absolute duty for which a principal could not escape liability by delegating to an independent contractor. In Durkin v. Hansen, the Court considered whether a landlord’s duty to maintain a premises pursuant to a rental agreement was an absolute duty owed to another person so that the landlord would be liable for the negligence of its independent contractor. 313 S.C. 343, 437 S.E.2d 550 (Ct. App. 1993). The Court set forth the legal premise that “[a] person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent

contractor were an employee.” Id at 347, at 552-553 (internal citations omitted).² The Court then found that the landlord was responsible for maintaining the condominium premises pursuant to the rental agreement. Id at 347-48, 553. Next, the Court stated that “[t]he performance of duties assumed by Respondents by the rental agreement and those imposed by the RLTA may, of course, be delegated to others. However, liability for injury or damage resulting from the performance of these duties may not be avoided merely by the employment of an independent contractor.” Id at 348, 553. Therefore, the Court found that the landlord’s duty to maintain the condominium premises pursuant to its rental agreement was an absolute duty owed to the tenant so that the landlord could not escape liability by delegating the duty to an independent contractor. Similarly, in the present case, Respondent had a duty to maintain its common area which was imposed by its Covenants and Restrictions. Like the landlord’s duty to maintain the premises in Durkin, Respondent here had a duty to maintain its common areas. Respondent owed the same absolute duty to Appellant Tommy Hobbs to maintain the common area as the landlord in Durkin owed to its tenant, and cannot escape liability by delegating the duty to an independent contractor.

b. A nondelegable duty exists in other similar circumstances such as the landlord-tenant context.

“An exception to the general rule is that ‘[a] person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an

² This rule was cited in Simmons v. Tuomey Regional Medical Center, 330 S.C. 115, 118, 498 S.E.2d 408, 409 (Ct. App. 1998), and Rock Hill Telephone Co. v. Globe Communications, Inc., 363 S.C. 385, 390, 611 S.E.2d 235, 238 (2005).

employee.”” Rock Hill Telephone Co., 363 S.C. at 390, 611 S.E.2d at 238 (internal citations omitted). In Simmons v. Tuomey Regional Medical Center, our Supreme Court noted a number of nondelegable duties that have been recognized in South Carolina. The Court stated, “[t]his Court and the Court of Appeals have applied the nondelegable duty doctrine in several situations. An employer has a nondelegable duty to employees to provide a reasonably safe work place and suitable tools, and remains vicariously liable for injuries caused by unsafe activities or tools under the employer's control. A landlord who undertakes repair of his property by use of a contractor has a nondelegable duty to see that the repair is done properly, and remains vicariously liable for injuries caused by improper repairs. A common carrier has a nondelegable duty to ensure that cargo is properly loaded and secured, and remains vicariously liable for injuries caused by an unsecured load. A bail bondsman has a nondelegable duty to supervise the work of his employees, and remains vicariously liable for injuries caused by those employees. A municipality has a nondelegable duty to provide safe streets even when maintenance is undertaken by the state Highway Department, and remains vicariously liable for injuries caused by defective repairs.” 341 S.C. 32, 42-43, 533 S.E.2d 312, 317-318 (2000). In Simmons, the Court found that a hospital had a nondelegable duty with regard to physicians who practice in their emergency rooms, despite the fact that this nondelegable duty exception had not previously been recognized. Id at 53, 323.

One such circumstance in which a nondelegable duty was found, as set forth above, is “[a] landlord who undertakes repair of his property by use of a contractor has a nondelegable duty to see that the repair is done properly, and remains vicariously liable for injuries caused by improper repairs.” Id at 42-43, 317-318. This nondelegable duty

was considered in Durkin v. Hansen, wherein the Court stated that “where the landlord undertakes to repair or improve the demised premises, whether he is under an obligation imposed by a covenant on his part to repair or improve or not, he is required to exercise reasonable care in making such repairs or improvements, and is liable for injuries caused by his negligence or unskillfulness or that of his servants and employees in making them or in leaving the premises in an unsafe condition.” 313 S.C. at 346-47, 437 S.E.2d at 552. Further, the Court stated that “[a] landlord who makes repairs and improvements on the demised premises owes a duty of reasonable care to the occupying tenants which he cannot escape by placing the work with an independent contractor. This is especially true where the work to be done is attended with danger to the tenant. Moreover, a landlord owes his tenants a nondelegable duty not to create unsafe conditions on premises and is thus vicariously liable for torts of his independent contractor.” Id at 348, 553. (internal citations omitted). In Durkin a tenant was injured by the negligence of an independent contractor carpet cleaner. The landlord was obligated to maintain the condominium premises by virtue of its lease agreement with the tenant.³ Id at 347-348, 553. Like the rental agreement in Durkin, the Covenants and Restrictions in the present case created an obligation on the part of Defendant to maintain the common area. (R. p. 193) (See Covenants and Restrictions, Article VI, Section 12, pg. 18).

In the present case, the facts are very similar to the already recognized nondelegable duty owed by a landlord to a tenant. Here, Respondent was obligated to maintain the common areas by the Covenants and Restrictions and hired an independent

³ In Durkin, the Court states that in addition to the duties set forth in the rental agreement, Defendants also had duties imposed by the South Carolina Residential Landlord Tenant Act. 313 S.C. at 348-349, 437 S.E.2d at 553.

contractor to perform the necessary tree work. Similarly, in Durkin, the defendant undertook maintenance which it was obligated to perform pursuant to its rental agreement by hiring an independent contractor. In the present case, the independent contractor's negligence caused Appellants' injuries, like the negligence of the independent contractor in Durkin caused the tenant's injuries. Therefore, the Court should find that Respondent owed Appellant Tommy Hobbs a nondelegable duty when performing maintenance and repairs so that it is liable for its independent contractor's negligent actions as if he had been a employee.

- c. Appellant Tommy Hobbs, as a member of Fairway Oaks, was considered an invitee in Fairway Oaks's common area, and South Carolina has recognized a nondelegable duty in other similar cases where the injured party had the same or a lesser status than Appellant Tommy Hobbs had as an invitee**

Appellant Tommy Hobbs was a member of Respondent, and was injured on Respondent's common area. "South Carolina recognizes four classes of persons present on the property of another: adult trespassers, invitees, licensees, and children. A landowner's duty toward a person to maintain his land in a certain condition depends upon the person's status." Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc., 317 S.C. 200, 203, 452 S.E.2d 619, 620 (Ct. App. 1994) (internal citation omitted). A member of a homeowners association, such as Appellant Tommy Hobbs, is considered an invitee on the common area owned by the homeowners association. Id at 204, 621. "In premises liability cases, the invitee is offered the utmost duty of care by the landowner and a trespasser is generally offered the least." Sims v. Giles, 343 S.C. 708, 715, 541

S.E.2d 857, 861 (Ct. App. 2001). In other premises liability cases wherein a nondelegable duty is owed, the person to whom the duty was owed was also an invitee. For instance, a customer in a store is considered an invitee⁴ and “[a] storekeeper does not escape liability to his customer who falls through an unguarded hole in the floor of the store upon a plea that the hole had been made and left unguarded by an independent contractor, nor is the storekeeper aided in his effort to escape liability by his previous exaction of a promise by the contractor adequately to guard the hole.” S. Carolina Nat. Gas Co. v. Phillips, 289 F.2d 143, 148 (4th Cir. 1961). Here, Appellant Tommy Hobbs, as an invitee, had the same status as a customer at a store. Further, as already discussed, a landlord owes a nondelegable duty to its tenants when performing maintenance and repairs. See Durkin 313 S.C. at 346-48, 437 S.E.2d at 552-553. As an invitee, Appellant Tommy Hobbs would have at least the same status as a tenant, who also is owed a nondelegable duty by his/her landlord.⁵

d. Courts in other states who have ruled on similar issues have determined that homeowners associations have nondelegable duties to their members in circumstances similar to the present case

The question of whether a homeowners association (“HOA”) has a nondelegable duty of reasonable care when making repairs or improvements, including when

⁴ See Hoover v. Broome, 324 S.C. 531, 535, 479 S.E.2d 62, 65 (Ct. App. 1996).

⁵ I believe that a tenant would be considered an invitee in a common area based on the common area exception “under which a landlord has ‘a duty to maintain the common areas of a leased property in a safe condition.’” Wright v. PRG Real Estate Mgmt., Inc., 413 S.C. 276, 286, 775 S.E.2d 399, 404 (Ct. App. 2015), reh’g denied (Aug. 20, 2015). This is the same duty owed to an invitee. See Parker v. Stevenson Oil Co., 245 S.C. 275, 280-81, 140 S.E.2d 177, 179 (1965).

maintaining trees in the common area, is a novel question in South Carolina. In Simmons v. Tuomey Regional Medical Center, the Supreme Court was similarly presented with the novel issue of “whether a hospital owes a common law nondelegable duty to render competent service to its emergency room patients, such that it may not avoid liability for the negligent acts of emergency room physicians hired as independent contractors under a contract between the hospital and a separate corporation.” 341 S.C. at 35, 533 S.E.2d at 314. In answering this question, our Supreme Court looked to other jurisdictions who had previously decided the issue. Id at 44-48, 318-321 (discussion of decisions in other jurisdictions). The Supreme Court stated “[i]n sum, our decision is amply supported by law in other jurisdictions. Courts throughout the nation have struggled with this issue, and nearly all have held hospitals liable under one or more theories.” Id at 47, 320.

Other jurisdictions have examined similar issues to that which we are faced with in this case, and have found that homeowners associations have nondelegable duties in regard to common areas and features. In Affan v. Portofino Cove Homeowners Association, the California 4th District Court of Appeals found that a homeowners association had a nondelegable duty to property owners to maintain common area plumbing, and that the homeowners association could be liable for damage caused by an independent contractors’ negligent actions. 189 Cal. App. 4th 930, 945 (2010 Cal. App. 4th). In Affan a couple filed suit against a homeowners association when their condominium was damaged by sewage flooding. The plaintiffs alleged that the sewage flooding was caused by the homeowners’ association’s failure to properly maintain common area plumbing. Id at 484. The plaintiffs sought to hold the defendant homeowners’ association liable for the negligent acts of the plumbing contractor it hired

on the theory that it had a nondelegable duty to maintain the plumbing located in the common area. The covenants and restrictions required the defendant homeowners association to maintain the common areas including the plumbing system. Id at Foot Note 4. The Affan court stated that “[o]n remand, the trial court must determine whether the plumber’s negligence on May 3 constituted a substantial factor in causing the sewage eruption on May 14. If so, then the Association will be liable for the ensuing damage under the doctrine of nondelegable duty, assuming that Rescue Rooter’s negligence is established by stipulation or competent evidence.” Id at 945.⁶

Florida courts dealt with a similar issue in Vasquez v. Lago Grand Homeowners Association, wherein a resident and the estate of a deceased guest of the resident brought suit against a homeowners association after the guest’s ex-husband came into the condominium complex and shot the resident and the guest. 900 So.2d 587, 589-590. The condominium complex was responsible for security and hired an independent contractor security company to provide security on the premises. Id at 589. The plaintiffs alleged that the ex-husband was negligently allowed to enter the complex as the resident had told the security company not to allow him entry. Id at 591. The court found that the defendant homeowners association had a duty to keep the premises secure, and was liable for their failure to do so as a result of its contractual obligations. Id at 594. The court further noted that the homeowners association could not escape liability because it had hired an independent contractor. 900 So.2d 587, Foot Note 7.

Georgia has found that a homeowners association owes a nondelegable duty to

⁶ See also Frances T. v. Vill. Green Owners Assn., wherein the court found that a homeowners’ association “may properly be held to a landlord’s standard of care as to the common areas under its control.” 42 Cal. 3d 490, 499-500 (1986).

invitees on its common area so that it is liable for the negligent acts of its independent contractor. In Moon v. Homeowners' Ass'n of Sibley Forest, Inc., a homeowners association rented its pool to a company for a private party. 202 Ga. App. 821, 821, 415 S.E.2d 654, 655-656 (1992). The homeowners association hired a private company to provide lifeguard services for the event. Id. A guest of the event named Charles Moon was seriously injured when he was either thrown or dove into the pool. Id. at 821, 656. The court found that the homeowners association could be liable for the negligence of the lifeguard despite the fact that the company who was hired to provide the lifeguard was an independent contractor of the homeowners association. Id. at 824, 658. The court stated, “[a]s noted, Moon was, as to the Association, an invitee. Accordingly, the Association owed Moon a duty of ordinary care to keep the premises safe. OCGA § 51-3-1. Since this was a nondelegable duty, the mere fact that lifeguard services were being provided by Swimatlanta would not insulate the Association from potential liability. ‘A business invitor owes a *nondelegable duty* to protect (his) invitees from injury ... [.]’ Accordingly, the Association may be liable if Swimatlanta was negligent in failing to protect Moon from injury.” Id. at 824, 658 (internal citations omitted) (*emphasis original*). It is notable that the Moon court bases its finding of a nondelegable duty on the fact that Moon was an invitee of the homeowners association. As described above, Appellant Tommy Hobbs was considered an invitee when on the Respondent’s common area where he was injured by the negligence of Respondent’s independent contractor.

Similar to Georgia, Connecticut has recognized that a property owner owes invitees a nondelegable duty when maintaining its property. In Gazo v. City of Stamford, the court stated that “[o]ne exception to this general rule, however, is that the owner or

occupier of premises owes invitees a nondelegable duty to 'exercise ordinary care for the safety of such persons.'" 255 Conn. 245, 257, 765 A.2d 505, 512 (2001) (internal citations omitted). In Gazo, the plaintiff was injured when he slipped and fell on an icy sidewalk. Id. at 247, 507. The plaintiff filed suit against several defendants, including Chase Manhattan Bank, N.A. Id. Chase filed an apportionment claim against an independent contractor named Pierni that it had hired to perform ice and snow removal on the subject areas. Id. The court stated that "Pierni contracted to perform ice and snow removal services for Chase Bank, which had a nondelegable duty to keep its premises safe." Gazo v. City of Stamford, 255 Conn. 245, 253, 765 A.2d 505, 510 (2001).

As set forth above, other jurisdictions that have found that homeowners associations owe their members nondelegable duties when dealing with issues similar to those set forth in the present case. Further, Connecticut has held that a property owner owes a nondelegable duty to invitees to exercise ordinary care. Like the courts in California, Florida, Georgia and Connecticut, this Court should find that Respondent owed Appellant Tommy Hobbs a nondelegable duty so that it is liable for the actions of its independent contractor as if he had been an employee.

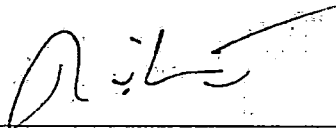
CONCLUSION

Appellants were injured by the actions of Respondent's independent contractor. While it is true that a principal is not generally liable for the negligence of its independent contractor, "[a]n exception to the general rule is that '[a] person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an employee.'" Rock Hill Telephone Co., 363 S.C. at 390, 611 S.E.2d at 238. That

exception should exist in the present case and the trial court erred in ruling that no exception existed. This Court has previously held that a landlord's duty to maintain property pursuant to a rental agreement is an absolute duty so that it cannot escape liability by hiring an independent contractor. See Durkin v. Hansen, 313 S.C. 343, 437 S.E.2d 550 (Ct. App. 1993). Similarly, in the present case, Respondent owed an absolute duty to Appellant Tommy Hobbs when performing maintenance such as tree cutting in its common area, and is liable for the negligent actions of its independent contractor.

Further, as described above, the present case is analogous to other situations in which a principal has a nondelegable duty so that it is liable for the actions of its independent contractors. Specifically, the present situation involving a member of a homeowners association suffering an injury in Respondent's common area is comparable to the already recognized landlord tenant exception wherein a landlord is liable for the negligent acts of its independent contractors when performing maintenance and repairs just as if he/she were an employee of the landlord. Further, other jurisdictions that have decided this novel issue of law have determined that a homeowners association owes a nondelegable duty to its members in regard to its common areas. For these reasons, the Court should find that Respondent owed Appellant Tommy Hobbs a nondelegable duty and is liable for the negligent actions of its independent contractor. Therefore, the trial court's Order Granting Summary Judgment to Defendant Fairway Oaks Homeowners Association should be reversed and the case remanded.

RESPECTFULLY SUBMITTED,



Raymond T. Wooten (S.C. Bar # 81483)

SMITH, JORDAN & LAVERY, P.A.

1810 East Main Street

Post Office Box 1207

Easley, South Carolina 29641-1207

(864) 855-1661 office

(864) 855-1685 fax

wooten@smithjordan.com

Attorney for Appellants

Easley, South Carolina
July 20, 2016

Other Counsel of Record:

Raymond T. Wooten
S.C. Bar No. 81483
Smith, Jordan & Lavery, PA
1810 East Main Street
Post Office Box 1207
Easley, South Carolina 29641-1207
(864) 855-1661 office
(864) 855-1685 fax
wooten@SmithJordan.com
Attorney for Appellants

TABLE OF CONTENTS

Table of Authorities	iii
Statement of Issues on Appeal.....	1
Statement of the Case.....	1
Statement of Facts.....	2
Standard of Review.....	4
Argument	5
I. The Circuit Court correctly found that Fairway Oaks is not liable for the negligence of an independent contractor that Hobbs hired.....	5
II. The Circuit Court properly declined to change South Carolina's long-standing independent contractor rule by refusing to create a new exception to the rule out of whole cloth.....	7
A. The Circuit Court properly held that the facts of this case do not fall within any recognized exception to the independent contractor rule.	7
B. The existing exceptions to the independent contractor rule rely on statutory or public obligations that are inapplicable to an HOA.....	8
C. Hobbs' attempt to analogize the facts of this case to a resident-landlord relationship fails because the facts and law governing the two relationships are substantially different, and without the Residential Landlord Tenant Act, even a landlord would not be liable under the facts of this case.....	10
i. Absent the RLTA, the independent contractor rule applies to a landlord-tenant relationship, and maintenance is not a nondelegable duty.....	13
ii. The landlord-tenant relationship is fundamentally different from the relationship between an HOA and its president, or even a homeowner and an HOA.....	16

iii.	The duties arising out of the RLTA apply to the physical quality of the premises, not negligent or criminal acts of others on the premises.....	18
D.	Hobb's reliance on factually distinguishable, intermediate appellate cases from foreign jurisdictions fails to provide any compelling basis for this Court to change long-standing South Carolina law.....	19
Conclusion		22

TABLE OF AUTHORITIES

Page Number

CASES

<u>Affan v. Portofino Cove Homeowners Ass'n</u> , 189 Cal. App. 4th 930, 117 Cal. Rptr. 3d 481 (Ct. App. 4th Dist., Div. 3, 2010)	20
<u>Belamy v. Hardee</u> , 242 S.C. 71, 129 S.E.2d 905 (1963)	7
<u>Carson v. Vance</u> , 326 S.C. 543, 485 S.E.2d 126 (Ct. App. 1997)	8, 9
<u>Cherry v. Myers Timber Co., Inc.</u> , 404 S.C. 596, 745 S.E.2d 405 (Ct. App. 2013)	5, 6
<u>Clea v. Odom</u> , 394 S.C. 175, 714 S.E.2d 542 (2011)	18
<u>Conlin v. City Council of Charleston</u> , 49 S.C.L. (15 Rich.) 201 (1868)	6
<u>Conner v. Farmers and Merchants Bank</u> , 243 S.C. 132, 132 S.E.2d 385 (1963)	14
<u>Cooke v. Allstate Mgmt. Corp.</u> , 741 F. Supp. 1205 (D.S.C. 1990)	18, 19
<u>Cramer v. Balcor Prop. Mgmt., Inc.</u> , 312 S.C. 440, 441 S.E.2d 317 (1994)	18
<u>Creighton v. Coligney Plaza Ltd. Partnership</u> , 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998)...	6, 13, 14, 15
<u>Dempsey v. Correct Mfg., Corp.</u> , 755 S.W.2d 798 (Tenn. Ct. App. 1988)	17
<u>Dolan v. City of Camden</u> , 233 S.C. 1, 103 S.E.2d 328 (1958)	8, 9
<u>Durkin v. Hansen</u> , 313 S.C. 343, 437 S.E.2d 550 (Ct. App. 1993)	9, 10, 11, 12, 16, 20
<u>Fair v. United States of America</u> , 334 S.C. 321, 513 S.E.2d 616 (1999)	18
<u>Gazo v. City of Stamford</u> , 255 Conn. 245, 765 A.2d 505 (2001)	22
<u>Gunter v. Graniteville Mfg. Co.</u> , 15 S.C. 443 (1881)	8
<u>Jenkins v. E. L. Long Motor Lines</u> , 233 S.C. 87, 103 S.E.2d 523 (1958)	8, 9
<u>Kinsey v. Spann</u> , 139 N.C. App. 370, 533 S.E.2d 487 (Ct. App. 2000)	17
<u>Moon v. Homeowners' Ass'n of Sibley Forest, Inc.</u> , 202 Ga. App. 821, 415 S.E.2d 654 (Ct. App. 1992)	21
<u>Nedrow v. Pruitt</u> , 336 S.C. 668, 521 S.E.2d 755 (Ct. App. 1999)	8
<u>Nelson v. Piggly Wiggly Center, Inc.</u> , 390 S.C. 382, 701 S.E.2d 776 (Ct. App. 2010)	4

<u>Privette v. Superior Court</u> , 5 Cal. 4th 689, 854 P.2d 721 (1993), <u>as modified on Denial of reh'g</u> (Sept. 16, 1993)	21
<u>Robertson v. Morris</u> , 209 W. Va. 288, 546 S.E.2d 770 (2001)	14, 17
<u>Sheppard v. Nienow</u> , 254 S.C. 44, 173 S.E.2d 343 (1970)	14
<u>Simmons v. Tuomey Regional Medical Center</u> , 341 S.C. 32, 533 S.E.2d 312 (2000)	8, 9, 19
<u>Talley v. John-Mansville Sales Corp.</u> , 285 S.C. 117, 328 S.E.2d 621 (1985)	12
<u>Timmons v. Williams Wood Products Corp.</u> , 164 S.C. 361, 162 S.E. 329 (1932)	14, 16
<u>Vasquez v. Lago Grand Homeowners Ass'n</u> , 900 So.2d 587 (Fla. Dist. Ct. App. 3d Dist. 2004)	21
<u>Watson v. Sellers</u> , 299 S.C. 426, 385 S.E.2d 369 (Ct. App. 1989)	11
<u>Wright v. PRG Real Estate Mgmt., Inc.</u> , 413 S.C. 276, 775 S.E.2d 399 (Ct. App. 2015)	19, 22
<u>Young v. Morrissey</u> , 285 S.C. 236, 329 S.E.2d 426 (1985)	13, 14

STATUTES

1986 S.C. Acts 336	11
California Civil Code § 1364(a)	20
Residential Landlord Tenant Act, South Carolina Code Ann. § 27-40-10, <u>et. seq.</u>	10, 11, 12, 13, 14, 18
South Carolina Code Ann. § 27-40-20(b)(1)	14
South Carolina Code Ann. § 27-40-440	11, 12
Rule 56(c), SCRCP	5

OTHER AUTHORITIES

S. 0218 General Bill, 119th Session, 2011-2012, "S.C. Homeowners Association Act"	12
---	----

STATEMENT OF ISSUES ON APPEAL

- I. The Circuit Court correctly refused to carve out a new exception to the independent contractor rule, and properly held that Respondent is not liable for the negligence of an independent contractor that the Appellant himself hired.

STATEMENT OF THE CASE

This appeal follows an Order of the Circuit Court refusing to create a new exception to the independent contractor rule and granting summary judgment in favor of Respondent Fairway Oaks Homeowners Association ("Fairway Oaks"). (R. p. 7). The material facts are undisputed. Appellant Charles Thomas Hobbs ("Hobbs") was the president of Fairway Oaks when he received a complaint about a dead limb on common areas maintained by Fairway Oaks endangering a townhouse owner's property. Hobbs – acting as the president of Fairway Oaks – personally selected and hired his friend Lee Lambright to cut the limb. The parties agree that Lambright was an independent contractor. While Hobbs stood in close proximity to the tree, Lambright cut a limb that fell and struck Hobbs on the head. As a result, Hobbs and his wife Mary Hobbs filed a complaint in the Pickens County Court of Common Pleas against Respondent on May 15, 2014.

Discovery revealed three undisputed facts: (1) Lambright was an independent contractor; (2) Hobbs made the decision to hire Lambright; and (3) no other person acting on behalf Fairway Oaks participated in the decision to hire Lambright or in the tree trimming activities on the date of the accident. Relying on these facts and application of the independent contractor rule, Fairway Oaks moved for summary judgment on January 2, 2015. (R. p. 22; pp. 25-29). Fairway Oaks filed a supporting memorandum, and the Hobbs filed an opposing memorandum.

The Honorable Judge Edward Miller held a hearing on the motion on August 7, 2015. At the hearing, Hobbs did not dispute the fact that Lambright was an independent contractor or that Hobbs himself hired Lambright, and he did not argue that any other person acting on behalf of Fairway Oaks participated in the events leading up to the incident. (R. p. 147, lines 16-17; p. 148, lines 7-8). Rather, he asked the Court to create a new exception to the independent contractor rule. After considering the arguments of both parties, Judge Miller refused to change the existing law, and granted Fairway Oaks' Motion for Summary Judgment in a written Order signed on September 15, 2015. (R. p. 7).

In its Order, the Circuit Court held that Fairway Oaks "is not liable for the negligence of an independent contractor that [Hobbs], as president of the HOA, hired, and there is no recognized exception that removes this case from the general independent contractor body of law." (R. p. 7). The Circuit Court considered Hobbs' arguments that the Court should create a new exception to the independent contractor rule, and refused to do so. (R. p. 7).

Appellants filed their Motion to Alter or Amend Judgment on November 3, 2015, which was denied by an Order dated November 17, 2015. Appellants filed their Notice of Appeal on December 10, 2015.

STATEMENT OF FACTS

On August 18, 2012, Benny Roper, a Fairway Oaks homeowner, called Hobbs to request the removal of a tree limb hanging over Roper's home. (R. p. 164, line 24-p. 165, line 9). Hobbs served as the president of Fairway Oaks and had done so for five years at the time of his injury. (R. p. 158, lines 16-19). Among other responsibilities as president of Fairway Oaks, Hobbs arranged for the maintenance and repair of Fairway Oaks' common areas. (R. p. 160, lines 4-8).

Hobbs advised Roper that he would hire a professional tree service based out of Liberty, South Carolina to remove the limb on behalf of Fairway Oaks. (R. p. 189, lines 13-p. 90, line 5). Although Fairway Oaks had previously hired a professional tree trimmer to perform similar services, Hobbs decided he did not want to pay a professional tree trimmer for this job. (R. p. 162, line 15-p. 163, line 21). Instead, Hobbs asked his personal friend Lee Lambright during a golf outing to remove the limb. (R. p. 16, lines 20-p. 161, line 2; p. 165, lines 3-21; p. 169, lines 15-20).

Although Hobbs had hired Lambright to perform odd jobs for Fairway Oaks over the years, Lambright explained: "I am not a contractor. I am just a neighborhood friend, and I do a lot of little projects for people." (R. p. 171, line 25-p. 172, line 7). Lambright had no training in limb removal, and he had never been hired or performed work removing tree limbs. (R. p. 172, line 8-p. 176, line 12). Lambright agreed to remove the limb if Hobbs would help, to which Hobbs agreed. (R. p. 165, lines 11-21).

On August 21, 2012, Hobbs met Lambright at Fairway Oaks, helped Lambright remove the ladder from his truck, and carried the ladder with Lambright to the tree at issue. (R. p. 178, line 3-p. 179, line 22). Hobbs held the bottom of the ladder as Lambright climbed up and began to remove branches with a chainsaw. (R. p. 179, lines 18-22). Then, Hobbs stood in close proximity to the tree as Lambright performed his work. (R. p. 192, lines 8-20). Although there were safer places to

stand, Hobbs stood "in the direct line of fire underneath the branch." (R. p. 192, lines 1-20).¹

Hobbs stood in close proximity to the tree while Lambright was cutting a large limb that fell and struck Hobbs on the head. (R. p. 187, line 20-p. 188, line 24; p. 191, lines 1-22). Hobbs candidly admitted that it was his own decision to attend the tree trimming and to stand where he did. (R. p. 167, lines 11-18). He further admitted that he was there as the president of Fairway Oaks. (R. p. 170, lines 4-13).

Hobbs claimed injuries and filed suit against the Respondent Fairway Oaks, of which he was the President. He did not file suit against Lambright, the independent contractor. Hobbs admits that he personally made the decision to hire Lambright instead of a professional tree trimmer in order to save money. (R. p. 170, lines 14-15). He also admits that he chose to stand where the limb fell, and he could have stood elsewhere. (R. p. 170, lines 16-23). Lastly, Hobbs presented no evidence before the Circuit Court that anyone else acted on behalf of Fairway Oaks to cause his injuries. In other words, the only negligence that Hobbs attempts to attribute to Fairway Oaks is from the acts of the independent contractor that Hobbs himself hired.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the Court of Appeals applies the same standard that governs the circuit court under Rule 56(c), SCRCP. Nelson v. Piggly Wiggly Center, Inc., 390 S.C. 382, 387-88, 701 S.E.2d 776, 779 (Ct. App. 2010).

¹ There is some factual dispute as to whether Hobbs actually assisted Lambright in the limb removal, but multiple witnesses testified that he did. (R. p. 190, lines 3-6) ("Q. And when you showed up the day the branch was being removed, it was Mr. Hobbs and Mr. Lambright removing the branch? A. Yes, sir."). (R. p. 187, lines 17-21). For purposes of this appeal, this factual dispute is immaterial because it is undisputed that Lambright was an independent contractor.

"Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." Rule 56(c), SCRPC.

ARGUMENT

The facts of this case present a typical independent contractor scenario, and the Circuit Court properly refused to change the existing law to create liability against Fairway Oaks when Hobbs himself selected the independent contractor without the involvement of any other officers or agents of Fairway Oaks. The trial court correctly found there is no recognized exception in South Carolina that would remove this matter from the general body of law, and the facts of this case do not justify the creation of a new exception. (R. p. 7). Accordingly, Fairway Oaks was entitled to judgment as a matter of law, and the trial court's grant of summary judgement should be affirmed.

I. The Circuit Court correctly found that Fairway Oaks is not liable for the negligence of an independent contractor that Hobbs hired.

The law in South Carolina governing liability for the negligence of an independent contractor is well established and clear: "A principal that hires an independent contractor is not liable for the negligence of that independent contractor, or for harm caused by that negligence." Cherry v. Myers Timber Co., Inc., 404 S.C. 596, 745 S.E.2d 405 (Ct. App. 2013) (holding that timber company was not responsible for torts of logger hired to harvest and haul timber to mills because the logger was an independent contractor). Although Hobbs² argues that this case involves a novel issue of law, the issue is far from novel. Nearly 150 years ago, the Court of Appeals of South Carolina announced the rule of law that controls this case: "[T]he owner of property, fixed or movable, for whose benefit a

² For ease of reference, Charles and Mary Hobbs are referred to collectively herein as "Hobbs" where appropriate.

work about such property is to be accomplished, is not held answerable for the negligence of an independent contractor to whom he has committed the work, and to be done without his control in its progress.” Conlin v. City Council of Charleston, 49 S.C.L. (15 Rich.) 201, 211 (1868). Lambright was an independent contractor performing work on property maintained by Fairway Oaks. Hobbs, on behalf of Fairway Oaks, committed the job to Lambright under Lambright’s control. Therefore, Fairway Oaks is not responsible for Lambright’s conduct.

The sole source of liability for which Hobbs seeks recovery is vicarious liability against Fairway Oaks for Lambright’s conduct. This is precisely the type of liability that the independent contractor rule precludes. Indeed, in Cherry, this Court upheld summary judgment in favor of a principal, despite negligence of its hired driver, because the driver was an independent contractor. Id. This Court held in Cherry, “for the purposes of imposing vicarious liability on the employer,” the test is “whether there is the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment.” Cherry at 601 (citing Creighton v. Coligney Plaza Ltd. Partnership, 334 S.C. 96, 116, 512 S.E.2d 510, 520 (Ct. App. 1998)).

Here, the question of the right and authority to control is a non-issue because Hobbs concedes that Lambright – whom he hired – was an independent contractor. (R. p. 148, lines 7-8). Lambright furnished his own tools, controlled the means and methods of his work, and even testified that he was acting as an independent contractor. (R. p. 177, lines 6-8). Therefore, Lambright was not an agent of Fairway Oaks and Fairway Oaks cannot be liable for his negligence. Because the only conduct that gives rise to Hobbs’ claim is

the conduct of Lambright, the independent contractor rule applies and the Circuit Court should be affirmed.

II. The trial court properly declined to change South Carolina's long-standing independent contractor rule by refusing to create a new exception to the rule out of whole cloth.

It is important to note what Hobbs is *not* contending and, even more importantly, why he is not making that contention. Hobbs is *not* asserting that Fairway Oaks negligently hired an independent contractor causing his injury. (R. p. 153, lines 11-14). He cannot. Hobbs himself decided to hire his friend Lambright instead of a professional tree trimmer. Therefore, Hobbs is left with only one option: asking this Court to ignore the fact that he chose the independent contractor with no applicable training or experience, and to take the unprecedented step of carving out a new exception to the independent contractor rule.

South Carolina's courts have traditionally recognized nondelegable duties only in areas where a defendant has a statutory or regulatory duty to act or when a defendant is providing a distinctly public service. However, in this case Hobbs asks this Court to create a new, nondelegable duty out of whole cloth. Hobbs would make Fairway Oaks vicariously liable for the conduct of the independent contractor that Hobbs chose. The facts of this case do not support such a drastic change in the long-standing independent contractor rule.

A. The Circuit Court properly held that the facts of this case do not fall within any recognized exception to the independent contractor rule.

The trial court correctly found that no recognized exception to the independent contractor rule applies to this case. (R. p. 7). South Carolina has recognized very few exceptions to the independent contractor rule, including:

- 1) An employer's duty to provide a reasonably safe place to work and tools for its employees; See Belamy v. Hardee, 242 S.C. 71, 129 S.E.2d 905 (1963);

- 2) A commercial motor carrier's duties to properly secure cargo; See Jenkins v. E. L. Long Motor Lines, 233 S.C. 87, 103 S.E.2d 523 (1958);
- 3) A bail bondsman's duties with respect to actions of a hired bounty hunter; See Carson v. Vance, 326 S.C. 543, 485 S.E.2d 126 (Ct. App. 1997);
- 4) A landlord's duties to maintain a tenant's property in a fit and habitable condition; See Nedrow v. Pruitt, 336 S.C. 668, 521 S.E.2d 755 (Ct. App. 1999);
- 5) A private hospital's provision of emergency room services; See Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000); and
- 6) A municipality's maintenance of public streets; See Dolan v. City of Camden, 233 S.C. 1, 103 S.E.2d 328 (1958).

The relative dearth of exceptions to a rule that has been recognized for well over a century highlights the degree to which South Carolina's courts have protected the independent contractor rule. None of the above-listed exceptions applies in this case.³

B. The existing exceptions to the independent contractor rule rely on statutory or public obligations that are inapplicable to an HOA.

In modern times, South Carolina has only recognized exceptions to the independent contractor rule based on nondelegable duties in two situations: (1) the defendant attempts to delegate a statutory duty; or (2) the defendant provides a public service and attempts to delegate that distinctly public duty.⁴ Because the facts of this case do not fall within either of these two classes, creation of a new exception to the independent contractor rule here would be unfitting.

Most of the modern exceptions to the independent contractor rule arise out of statutory duties. For example, the South Carolina Supreme Court relied upon the Motor

³ As the Circuit Court found, Hobbs was not an employee, and Hobbs does not make any such contention.

⁴ South Carolina has recognized a master's duty to provide a reasonably safe place and safe tools to an employee since the late nineteenth century. See Gunter v. Graniteville Mfg. Co., 15 S.C. 443 (1881). However, this duty is quite different from the more recently recognized exceptions to the independent contractor rule. From its inception, courts applying this exception require a showing that the breach of the employer's duty went beyond the mere negligence of a co-servant such that the employer was negligent in employing and supervising the co-servant. Id. at 456.

Carrier Rules and Regulations of the South Carolina Public Service Commission when it held that a commercial motor carrier's liability for improper loading of the vehicle could not be avoided when the shipper loaded the vehicle instead of the carrier. Jenkins, 233 S.C. at 95-96, 103 S.E.2d at 527-28. Likewise, this Court relied upon South Carolina statutes to hold a South Carolina bail bondsman liable for the negligence of an independent contractor hired as a bounty hunter. Carson, 326 S.C. at 550, 485 S.E.2d at 129-30 ("Bail bondsmen have a statutorily imposed responsibility for the actions of their runners [bounty hunters] when they receive their license."). As discussed in detail below, this Court also relied upon the Residential Landlord Tenant Act to recognize a nondelegable duty of a landlord while conducting business in a tenant's residence. Durkin v. Hansen, 313 S.C. 343, 348, 437 S.E.2d 550, 553 (Ct. App. 1993).

The remaining exceptions to the independent contractor rule recognized by South Carolina's courts involve government functions — such as the maintenance of public streets — or the provision of important services to the public — such as hospital services. See Dolan, 233 S.C. at 3-4, 103 S.E.2d at 329-330 (relying upon statutes and holding that municipalities may be liable for negligence with respect to roads maintained by the State Highway Department); Simmons (adopting Restatement (Second) of Torts § 429, which requires showing that the employer of the independent contractor holds itself out to the public as providing certain services, to hospital providing emergency room services to the public).

Neither of the general bases supporting an exception to the independent contractor rule applies here. No statute or regulation imposes a duty on Fairway Oaks to maintain its property in any particular manner. Moreover, Fairway Oaks is not providing a service to

the public. Its relationship to its relatively few homeowners (the properties are composed of approximately eighteen units) can easily be governed by traditional rules of contract and tort. (R. p. 159, lines 10-21). There is no overriding public interest or need to change the traditional tort laws with respect to the relationship between Fairway Oaks and Hobbs. Therefore, the Circuit Court properly applied the independent contractor rule and refused to create a new exception under the law.

C. Hobbs' attempt to analogize the facts of this case to a resident-landlord relationship fails because the facts and law governing the two relationships are substantially different, and without the Residential Landlord Tenant Act, even a landlord would not be liable under the facts of this case.

Hobbs places significant weight on the landlord-tenant exception, and particular emphasis on this Court's opinion in Durkin, *supra*. However, the exception recognized in Durkin is not analogous and has only been applied in a specific context: a landlord-tenant relationship. Because of the differences between the landlord-tenant relationship and the HOA-homeowner relationship — not the least of which is the fact that the former is governed by statute and the latter is not — the creation of a new exception based on the landlord-tenant exception would not be appropriate from a legal or factual perspective.

In Durkin, the landlord hired a contractor to enter into the plaintiff's dwelling unit to clean the carpets. The plaintiff came home and slipped on a slick substance left by the contractor in her unit. *Id.* at 345, 437 S.E.2d at 552. This Court looked to the contract and the Residential Landlord Tenant Act ("RLTA") to find the landlord owed a nondelegable duty: "a *landlord* who makes repairs and improvements on the demised premises owes a duty of reasonable care to the occupying tenants which he cannot escape by placing the work with an independent contractor." Durkin, 313 S.C. at 348, 437 S.E.2d at 553 (citations

omitted) (emphasis added). Although Hobbs' proposed exception includes similar words, the exception has never been applied to similar facts.

The landlord-tenant exception only applies in a residential rental setting, and it requires a landlord and a tenant. See Durkin, supra. Here, the landlord-tenant exception does not apply: *Fairway Oaks is not a landlord and Hobbs is not a tenant. Fairway Oaks is an HOA and Hobbs was its president.* This case has no nexus to a landlord-tenant relationship.

More importantly, the creation of the resident-landlord exception by this Court in Durkin came *after* and *as a result of* the General Assembly's enactment of the RLTA. See S.C. Code Ann. §§ 27-40-10, et. seq. The entire purpose of the RLTA was to "simplify, clarify, modernize, and revise" the law governing residential rental properties. Watson v. Sellers, 299 S.C. 426, 434, 385 S.E.2d 369, 373 (Ct. App. 1989) (quoting 1986 S.C. Acts 336) (emphasis in original). Therefore, the RLTA *changed* the common law as it applied to the relationship between a landlord and tenant. See S.C. Code Ann. §§ 27-40-10, et. seq. Because no similar statute governs the HOA-homeowner relationship – and certainly not the HOA-president relationship – the landlord-tenant exception is inapplicable in this case.

Pursuant to the RLTA, a landlord must "comply with the requirements of applicable building and housing codes materially affecting health and safety," "make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition," and "keep all common areas of the premises in a reasonably safe condition . .

.” S.C. Code Ann. § 27-40-440.⁵ Unlike the landlord-tenant relationship, the South Carolina General Assembly has not adopted a similar act for common ownership of properties such as a homeowners association. Although Homeowners Association Acts have been proposed in South Carolina, the General Assembly has so far declined to adopt any such acts. See e.g., S. 0218 General Bill, 119th Session, 2011-2012, “S.C. Homeowners Association Act.”

In effect, Hobbs is petitioning this Court to create a new exception to the independent contractor rule even though the General Assembly has declined to do so. The Legislature has shown its ability to create such legislation by enacting the RLTA. If the General Assembly wanted similar rules to apply to HOAs, it could have enacted a Homeowners Association Act or held that HOAs are subject to the RLTA. It has not, and it is not the function of the courts to write such an expansion of the law. See e.g., Talley v. John-Mansville Sales Corp., 285 S.C. 117, 119, 328 S.E.2d 621, 622 (1985) (“Such a change is the function of the legislature, and this Court refuses to usurp legislative authority in this matter.”).

Hobbs’ attempt to analogize the facts of this case to those in Durkin serves as a poor compass for this Court’s analysis because that case dealt with a statutorily-governed landlord-tenant relationship; this case does not. Additionally, comparison to Durkin fails for three key reasons: (1) absent the RLTA, a landlord is not liable for the conduct of an

⁵ The Covenants and Restrictions for Fairway Oaks does not go nearly as far as the language in the RLTA. The Covenants and Restrictions only state, “Common areas shall be the responsibility of the Association, which shall maintain the parking lots, grounds and common buildings.” (R. p. 193, Section 12). Whereas the RLTA states repairs must put the premises in a “fit and habitable condition” and keep common areas “reasonably safe,” there is no representation in the Covenants and Restrictions regarding the safety of common areas or any standard to which the property must be maintained.

independent contractor; (2) the HOA is not a landlord; and (3) the danger here was not caused by any physical quality of the premises.

i. Absent the RLTA, the independent contractor rule applies to landlord-tenant relationships, and maintenance is not a nondelegable duty.

The RLTA substantially changed the common law duties and liabilities of a landlord. Before the adoption of the RLTA, a landlord was not automatically liable for the negligence of its independent contractor. See Young v. Morrissey, 285 S.C. 236, 329 S.E.2d 426 (1985). In fact, in commercial leases that are not subject to the RLTA, a landlord continues to remain shielded by the independent contractor rule when a plaintiff is injured due to that independent contractor's negligence on the landlord's premises. See Creighton, supra. Therefore, application of the nondelegable duty doctrine to Fairway Oaks is not supported in the absence of a statute obligating Fairway Oaks to maintain the property.

Prior to the enactment of the RLTA, the South Carolina Supreme Court applied the independent contractor rule to shield a residential landlord from the negligence of an independent contractor in Young. The landlord defendant hired an electrical subcontractor to wire the heating and air conditioning units of an apartment complex during its construction. The electrician – an independent contractor – negligently installed the wiring, resulting in a fire that caused the death of two minors. 285 S.C. at 238-39, 329 S.E.2d at 427-28. The landlord's lease also obligated the landlord to repair the leased premises upon notice of any defects. Id. Nonetheless, the Supreme Court held that the

landlord was not responsible for the negligence of the independent contractor. Id. at 242, 329 S.E.2d at 429-30.⁶

Furthermore, prior to the enactment of the RLTA, a contractual obligation of a landlord to repair the premises did not give rise to a negligence cause of action in tort:

A landlord may, however, enter into a binding agreement to keep the demised premises in repair, but even then the landlord is entitled to notice of any existing defects before becoming obligated to repair. Even when a landlord so obligates himself, a failure to make repairs will give rise merely to a right of action for breach of contract under which damages are not recoverable for personal injuries sustained by reason of the defective condition of the premises.

Id. at 239-40, 329 S.E.2d at 428 (citing Timmons v. Williams Wood Products Corp., 164 S.C. 361, 162 S.E. 329 (1932); Conner v. Farmers and Merchants Bank, 243 S.C. 132, 132 S.E.2d 385 (1963); Sheppard v. Nienow, 254 S.C. 44, 173 S.E.2d 343 (1970)).

Here, at best Hobbs presented evidence that Fairway Oaks contractually agreed to “maintain” the common areas. Absent more, Hobbs cannot seek recovery for his personal injuries. See Young, *supra*; Timmons, *supra*.

Fairway Oaks’ hiring of Lambright to trim the tree does not change the analysis. Although the RLTA changed the common law as it applies to the independent contractor defense in a residential lease context, the RLTA does not apply to commercial leases. See S.C. Code Ann. § 27-40-20(b)(1). In Creighton, this Court held that a landlord in a commercial lease is not liable for the conduct of an independent contractor *even when it assumes a duty to maintain the premises*. In that case, a commercial landlord hired an

⁶ South Carolina courts have recognized a limited exception to the independent contractor rule for inherently dangerous activities. Hobbs has never argued that the tree trimming in this case was inherently dangerous, and that issue is not preserved for review. Moreover, tree trimming is not an inherently dangerous activity because the risks – such as the risk at issue in this case – can be removed by taking proper precautions. See Robertson v. Morris, 209 W. Va. 288, 546 S.E.2d 770 (2001) (holding that tree trimming was not inherently dangerous because risks could be prevented with proper precautions).

independent contractor to maintain vegetation near entrance steps leading to a leased premises where a plaintiff fell and was injured. 334 S.C. at 115, 512 S.E.2d at 520. This Court recognized two rules: (1) a person who voluntarily undertakes to perform an act must use due care in the performance of that act; and (2) a landlord who attempts to make premises safe must use due care. Id. at 115-116, 512 S.E.2d at 520 (citations omitted).

This Court held that the landlord voluntarily undertook the maintenance of the steps by hiring a lawn care service – an independent contractor – to maintain the plants at the entrance steps where the plaintiff was injured. Id. However, despite the landlord's assumption of the duty to maintain the property, this Court went on to hold that the independent contractor rule applied to shield the landowner from liability for the lawn care service's negligence. Id. Therefore, the landlord could not be held liable for injuries caused by the independent contractor's negligence even after the landlord assumed the duty of maintaining the stairway.

The same legal principles apply here. Like the landlord in Creighton, Fairway Oaks had a duty to maintain the common areas of the association. Also, like the landlord in Creighton, Fairway Oaks hired an independent contractor to perform a particular task: cutting the tree limb. Hobbs' injuries did not result from a general condition of the common area. The limb did not fall on its own or because Fairway Oaks failed to properly maintain the common area. Rather, Hobbs' injuries resulted directly from Lambright's performance of the work when he cut the limb and from Hobbs' decision to stand in close proximity to the tree when it was being cut. The limb fell and struck Hobbs because Lambright – an independent contractor – negligently performed the task and Hobbs was standing too close to the tree when the limb fell.

The nondelegable duties in the landlord-tenant context arise out of the RLTA. No similar statute has been adopted that would apply to an HOA under the facts of this case. Moreover, the duties in the landlord-tenant cases deal with physical conditions of the property, not tortious acts of third parties. Therefore, Hobbs' attempt to analogize the facts of this case – where he hired the independent contractor himself and was injured while acting as the president of Fairway Oaks – falls flat. Expansion of this Court's holding in Durkin to this case is not justified.⁷

ii. The landlord-tenant relationship is fundamentally different from the relationship between an HOA and its president, or even a homeowner and an HOA.

The relationship between a landlord and tenant is distinct from the relationship at issue in this case. Hobbs was the president of Fairway Oaks and acting as the president when he was injured. Even when compared to the relationship between an HOA and a homeowner, the comparison to a landlord-tenant relationship is strained at best.

A homeowner in an HOA is a member of the HOA with voting rights. The homeowner has the ability to influence the HOA and its conduct. In this case, Hobbs was the president of the HOA. Moreover, the homeowner owns his home. He has the right to make repairs at his will. The property under the control of the HOA is separate from the homeowner's residence.

⁷ Although this Court in Durkin cited both the RLTA and the language in the lease agreement as supporting a finding of a nondelegable duty, a mere agreement in a lease to repair the premises – even with notice – does not give rise to an action in tort for recovery of personal injuries. See e.g., Timmons, *supra* (holding that landlord was not liable in tort for injuries to tenant's daughter when door fell on her foot despite fact that lease stated that landlord would repair premises, landlord was notified of the dangerous door hinge, and landlord failed to repair the hinge). Because the landlord in Timmons did not have a duty in tort to make the repairs, the duty arises only in contract, the breach for which does not give rise to a cause of action for personal injuries. Id. at 332.

In contrast, a tenant has no ownership in the rented property. In residential leases, the tenant rarely has the right to make any substantial changes to the rented property. In addition, aside from threatening not to renew a lease, the tenant has no say in what the landlord does with the property. In the typical residential lease, the landlord not only has control over any common areas, but also has final say in any changes that the tenant may desire to make to his residence.

As it relates to common areas, the HOA's role is more similar to that of a neighboring landowner than a landlord. While both have a duty to maintain premises under their control, the HOA's control stops at the homeowner's property line. Like a neighboring landowner, the HOA does not have a duty to maintain or any significant control over the homeowner's residence or property.

A neighboring landowner is not liable for the negligence of an independent contractor tree trimmer. See e.g., Robertson, *supra* at p.13 n.6 (applying independent contractor rule to homeowner who hired tree trimmer); Kinsey v. Spann, 139 N.C. App. 370, 533 S.E.2d 487 (Ct. App. 2000) (applying independent contractor rule to landowner who hired her nephew as an independent contractor to trim a tree, resulting in plaintiff neighbor's death); Dempsey v. Correct Mfg. Corp., 755 S.W.2d 798 (Tenn. Ct. App. 1988) (applying independent contractor rule to utility that hired tree trimmer). Therefore, Fairway Oaks is not responsible to a homeowner for the negligence of an independent contractor under a nondelegable duty doctrine. Moreover, Hobbs was on the premises not as a homeowner at the time of the incident, but as the Fairway Oaks president. (R. p. 168, lines 23-25). Therefore, the landlord-tenant analogy is even more attenuated and even less applicable.

iii. The duties arising out of the RLTA apply to the physical quality of the premises, not negligent or criminal acts of others on the premises.

Hobbs was not injured by any physical quality of the Fairway Oaks common area.

The tree limb did not fall due to Fairway Oaks' failure to notice a dead limb and remedy the situation. It fell because Lambright – an independent contractor – was negligent in his work, and Hobbs was injured because he was standing too close to the tree while Lambright worked. Even under the RLTA – which does not apply to the HOA – the nondelegable duty exception to the independent contractor rule only extends to defective conditions on the premises, not injuries caused by negligent actors on the premises.

In Fair v. United States of America, 334 S.C. 321, 323, 513 S.E.2d 616, 617 (1999), the South Carolina Supreme Court limited the scope of the RLTA “fit and habitable” requirement to the “inherent physical state of the leased premises.” Therefore, a landlord was not liable for injuries caused when one tenant’s dog bit another tenant’s daughter. Id. The Supreme Court rejected the argument that the RLTA changed the pre-existing law regarding dog bites because a dog is not part of the “inherent physical state of the leased premises.”⁸ Id.

Similarly, Courts have routinely held that a landlord does not owe a duty to insure the safety of residents from criminal acts of third parties. See e.g., Cooke v. Allstate Mgmt. Corp., 741 F. Supp. 1205 (D.S.C. 1990) (holding that RLTA did not impose a duty on a landlord to protect tenants from criminal activity); Cramer v. Balcor Prop. Mgmt., Inc., 312 S.C. 440, 441 S.E.2d 317 (1994) (same). For purposes of keeping the premises safe,

⁸ In a subsequent case, the Supreme Court held that a landlord who had actual knowledge of a dog’s dangerous propensities could be liable for injuries caused to a tenant’s invitee on common areas because the RLTA creates a statutory mandate for a landlord to keep the common areas “reasonably safe.” See Clea v. Odom, 394 S.C. 175, 714 S.E.2d 542 (2011). Notably, the Supreme Court expressly relied on the RLTA requirement in reaching its result. As discussed above, the RLTA does not apply to an HOA.

there is no appreciable difference from a duty to prevent criminal acts of third parties and the duty to prevent tortious acts of third parties.

For the same reasons, Hobbs' contention that he was an invitee is unavailing. Hobbs cites the "common areas" exception – which applies to landlords, not HOAs – to support his contention that he was an invitee and Fairway Oaks cannot rely upon the independent contractor rule to avoid liability for his injuries. However, the "common areas" exception also only applies to physical conditions on the common areas, not acts of third parties. See Cooke, 741 F. Supp. at 1211 ("This rule clearly has never been applied in South Carolina to anything except physical injuries resulting directly from the *condition* of the premises themselves") (emphasis in original); Wright v. PRG Real Estate Mgmt., Inc., 413 S.C. 276, 286, 775 S.E.2d 399, 404-05 (Ct. App. 2015) (same). Therefore, even if this Court analogized the landlord-tenant relationship with the facts of this case, the independent contractor rule still applies and the HOA cannot be held liable for Lambright's actions.⁹

D. Hobbs' reliance on factually distinguishable, intermediate appellate cases from foreign jurisdictions fails to provide any compelling basis for this Court to change long-standing South Carolina law.

Hobbs looks to foreign jurisdictions to find case law "on similar issues," presumably because he cannot find support for his position in South Carolina law.

⁹ Even assuming for the moment that this claim were brought in a context where the nondelegable duty doctrine applied, our Supreme Court explained the problems it may pose for Hobbs given the facts in this case:

"The term "nondelegable duty" is somewhat misleading. A person may delegate a *duty* to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, *the delegating person remains liable for that breach.*"

Simmons, 341 S.C. at 42, 533 S.E.2d at 317. Appellant admitted that it was his decision alone to delegate the tree limb removal job to the unskilled, untrained independent contractor. (R. p. 169, lines 15-17). Accordingly, even if the Court did extend the existing body of case law to find a new exception under the nondelegable duty doctrine, "the delegating person remains liable for that breach."

However, not only do intermediate appellate decisions from California and Florida lack any binding authority over this Court, but also the cases raised are not persuasive and do not set forth any compelling justification for changing the law of this State under the facts of this case.

Hobbs looks primarily to Affan v. Portofino Cove Homeowners Ass'n for a duty owed by a condominium association to condominium owners. 189 Cal. App. 4th 930, 117 Cal. Rptr. 3d 481 (Ct. App. 4th Dist., Div. 3, 2010). However, California's Civil Code – like the RLTA in Durkin – mandated repair, replacement or maintenance of common areas by the condominium association. Id. at 935; Calif. Civil Code § 1364(a). As discussed above, South Carolina has no such statute. Moreover, the source of the injuries in Affan was the HOA's failure to remedy a defective condition. The plaintiffs in that case were not injured by a direct act of the HOA or the HOA's independent contractor. Rather, the injuries arose out of the HOA's failure to maintain a common sewage line that serviced multiple units and the contractor's failure to remedy the situation, which eventually led to additional sewage overflow in the plaintiff's condominium unit. Id. at 936. In other words, the independent contractor's negligence left a physical condition on the common area – a sewage blockage – that eventually caused damage to the plaintiff's unit. In contrast, Hobbs injuries did not result from a condition on the land left by Lambright. Rather, they resulted directly from Lambright's actions. Therefore, Affan fails to provide guidance to the Court's analysis here.

Guidance from Affan is problematic for another reason. For some seventy years, California's courts have continually eroded the independent contractor doctrine:

“[o]ver time, the courts have, for policy reasons, created so many exceptions to this general rule of nonliability that ‘the rule is now primarily important as a preamble to the catalog of its exceptions.’ ”

Privette v. Superior Court, 5 Cal. 4th 689, 693, 854 P.2d 721, 724 (1993), as modified on denial of reh'g (Sept. 16, 1993) (citations omitted) (emphasis added). Unlike California, South Carolina’s courts have strongly guarded the independent contractor rule and recognized very few exceptions. Although California’s courts may freely carve out new exceptions to the independent contractor rule, the history of the rule in South Carolina reveals a very different approach in this State.

Appellant also references a Georgia case that is distinguishable on its face. The defendant HOA in Moon was sued for either its direct negligence or the negligence of its unqualified independent contractor lifeguard in failing to prevent party guests from throwing the plaintiff in a pool. Moon v. Homeowners' Ass'n of Sibley Forest, Inc., 202 Ga. App. 821, 824, 415 S.E.2d 654, 658 (Ct. App. 1992). However, the Moon case dealt with an HOA that rented a pool to a business, not its homeowners. The liability in that case arose out of an HOA acting as a business in renting out its facilities, not as an HOA landowner maintaining common property. Therefore, relying upon Moon to create a non-delegable duty between an HOA and its homeowners (or president) is a poor fit.

Finally, Appellant raises various duties and obligations recognized in foreign jurisdictions where South Carolina law offers no such remedy. Each of these cases are factually distinguishable, and none is persuasive. For example, in Vasquez v. Lago Grand Homeowners Association, 900 So.2d 587 (Fla. Dist. Ct. App. 3d Dist. 2004), a Florida court held an HOA liable for a contracted security company’s failure to prevent a multiple homicide. South Carolina’s courts have held that a landlord – and even more so an HOA

– are not insurers of a tenant or homeowner’s safety. See Wright, supra (holding a landlord and apartment managers did not have a duty to provide security for a tenant and that the common areas exception did not apply to impose a duty to keep common areas secure from criminal activity).¹⁰

Put simply, no exception to the general rule of nonliability applies to the facts of this case. Although Plaintiff points to cases from foreign jurisdictions that are easily distinguishable, South Carolina has not recognized any exception – through statute or common law – that removes the present matter from the general body of case law. The Circuit Court correctly held that no recognized exception applies, and properly refused to create a new exception to the independent contractor rule out of whole cloth. Accordingly, the trial court’s Order granting Summary Judgment should be affirmed.

CONCLUSION

The Circuit Court properly held that no recognized exception to the independent contractor rule applies in this case, and the Circuit Court correctly refused to carve out a new exception. Hobbs failed to present any actionable theory that would hold Respondent Fairway Oaks Homeowners Association liable for the negligence of an independent contractor that Hobbs personally hired. The general rule of nonliability applies, and no exception removes this matter from that body of case law. Therefore, this Court should affirm the Circuit Court’s ruling granting summary judgment in Respondent Fairway Oaks’ favor.

¹⁰ The claim in Gazo v. City of Stamford, 255 Conn. 245, 765 A.2d 505 (2001) deals with a business-owner’s duties to the general public. Those facts have no application to the situation in this case where the Fairway Oaks property was not business property open to the public.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



J.R. Murphy, Esquire

S.C. Bar No. 7941

Wesley B. Sawyer, Esquire

S.C. Bar No. 100229

Elliott B. Daniels, Esquire

S.C. Bar No. 101165

PO Box 6648

Columbia, South Carolina 29260

(803) 782-4100

Wsawyer@murphygrantland.com

Attorneys for Respondent

Columbia, South Carolina
July 20, 2016

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM PICKENS COUNTY

Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2014-CP-39-00613

Charles Thomas Hobbs and Mary Hobbs.....Appellants,

v.

Fairway Oaks Homeowners
Association.....Respondents.

CERTIFICATE

I, Wesley B. Sawyer, Esquire, attorney for Respondent, certify that the Final Brief of Respondent complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.

MURPHY & GRANTLAND, P.A.



J.R. Murphy, Esquire

S.C. Bar No. 7941

Wesley B. Sawyer, Esquire

S.C. Bar No. 100229

Elliott B. Daniels, Esquire

S.C. Bar No. 101165

PO Box 6648

Columbia, South Carolina 29260

(803) 782-4100

Wsawyer@murphygrantland.com

Attorneys for Respondent

Columbia, South Carolina
July 20, 2016

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No: 2015-002573

Charles Thomas Hobbs and Mary Hobbs..... Appellants,

v.

Fairway Oaks Homeowners Association..... Respondent.

PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent upon Charles Thomas Hobbs and Mary Hobbs, via regular mail, on July 20, 2016, to their attorney of record, Raymond T. Wooten, Esq. of Smith, Jordon, Lavery & Lee, P.A., 1810 E. Main Street, Easley, SC 29644.



Wesley B. Sawyer, Esquire
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
803-782-4100 phone
803-782-4140 fax
*Attorney for Respondent Fairway
Oaks Homeowners Association*

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No.: 2014-CP-39-00613

Charles Thomas Hobbs and Mary
Hobbs,

Appellants,

v.

Fairway Oaks Homeowners
Association,

Respondent.

FINAL REPLY BRIEF OF APPELLANTS

Raymond T. Wooten (S.C. Bar # 81483)
SMITH, JORDAN & LAVERY, PA
1810 East Main Street
Post Office Box 1207
Easley, South Carolina 29641-1207
(864) 855-1661 office
(864) 855-1685 fax
Wooten@SmithJordan.com
Attorney for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No.: 2014-CP-39-00613

Charles Thomas Hobbs and Mary
Hobbs,

Appellants,

v.

Fairway Oaks Homeowners
Association,

Respondent.

FINIAL REPLY BRIEF OF APPELLANTS

Raymond T. Wooten (S.C. Bar # 81483)
SMITH, JORDAN & LAVERY, PA
1810 East Main Street
Post Office Box 1207
Easley, South Carolina 29641-1207
(864) 855-1661 office
(864) 855-1685 fax
Wooten@SmithJordan.com
Attorney for Appellants

TABLE OF CONTENTS

Table of Authorities	ii
Arguments in Reply:	
I. RESPONDENT HAD A NONDELEGABLE DUTY OF REASONABLE CARE WHEN MAKING REPAIRS OR IMPROVEMENTS IN ITS COMMON AREA AND WAS LIABLE FOR THE NEGLIGENT ACTIONS OF ITS INDEPENDENT CONTRACTOR	2
a. Respondent owed an absolute duty to Appellant Tommy Hobbs so that it remains liable for the negligence of its independent contractor just as if the independent contractor were an employee	3
b. Based on its erroneous conclusion that the landlord-tenant exception is solely based on the RLTA, Respondent contends that the exceptions to the general rule of nonliability for the acts of independent contractors are only based on statutes or public obligations, and that therefore, any new exception should be statutorily based	9
c. A nondelegable duty exists in other similar circumstances such as the land-lord tenant context	10
d. Appellant Tommy Hobbs was considered an invitee in Respondent's common area, and the South Carolina has recognized a nondelegable duty in other similar cases where the injured party had the same or a lesser status than Appellant	11
e. Because this is a novel issue, the Court should look to the decisions of courts in other jurisdictions when deciding this case	12
f. Respondent's Brief is replete with factual contentions that are not relevant to the issue before the court and which are, in some cases, subject to conflicting testimony	13
Conclusion	14

TABLE OF AUTHORITIES

STATUTES

<u>Conlin v. City Council of Charleston</u> , 15 Rich. 201, 49 S.C.L. 201 (1868).....	10
<u>Conner v. Farmers and Merchants Bank</u> , 243 S.C. 132, 132 S.E.2d 385 (1963).....	4, 5
<u>Creighton v. Colingny Plaza Limited Partnership</u> , 334 S.C. 96, 512 S.E.2d 510.....	6
<u>Durkin v. Hansen</u> , 313 S.C. 343, 437 S.E.2d 550 (Ct. App. 1993).....	3, 4, 5, 6, 8, 11
<u>Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc.</u> , 317 S.C. 200, 452 S.E.2d 619 (Ct. App. 1994).....	11, 12
<u>S. Carolina Nat. Gas Co. v. Phillips</u> , 289 F.2d 143, 148 (4th Cir. 1961).....	11
<u>Simmons v. Tuomey Regional Medical Center</u> , 341 S.C. 32, 533 S.E.2d 312 (S.C. 2000).....	5, 8, 9, 10, 12
<u>Wilson v. Marshall</u> , 260 S.C. 271, 195 S.E.2d 610 (1973).....	14
<u>Young v. Morrissey</u> , 285 S.C. 236, 329 S.E.2d 426 (1985).....	5, 7

INTRODUCTION

Appellants filed suit against Respondent alleging that Respondent was liable for the negligent actions of Lee Lambright ("Lambright"), an independent contractor hired by Respondent to cut a tree limb on Respondent's common area. Respondent moved for summary judgment on the ground that because Lambright was an independent contractor, it was not liable for his negligent acts. The trial court granted Respondent's motion and denied Appellants' motion to reconsider. Appellants filed this appeal as Respondent owed Appellant Tommy Hobbs a nondelegable duty of reasonable care when making repairs or improvements in its common area, including when maintaining trees, such that it was liable for the negligent acts of its independent contractor. Specifically:

- a. Respondent owed an absolute duty to Appellant Tommy Hobbs so that it remains liable for the negligence of its independent contractor just as if the independent contractor were an employee;
- b. A nondelegable duty exists in other similar circumstances such as the landlord-tenant context;
- c. Appellant Tommy Hobbs, as a member of Fairway Oaks, was considered an invitee in Fairway Oaks's common area, and South Carolina has recognized a nondelegable duty in other similar cases where the injured party had the same or a lesser status than Appellant Tommy Hobbs had as an invitee; and
- d. Courts in other states who have ruled on similar issues have determined that homeowners associations have nondelegable duties to their members in circumstances similar to the present case.

Respondent argues that summary judgment was appropriate as there is no already recognized nondelegable duty so that the general rule that a principal is not liable for the actions of its independent contractor should apply. Respondent further argues that the Court should not find that Respondent owed Appellants a nondelegable duty. In doing so, it attempts to introduce unwarranted complexity into the already recognized nondelegable duties while ignoring the plain language of the cases setting forth these exceptions, and to argue that the present case is not analogous to the already recognized landlord-tenant exception to the independent contractor nonliability rule. Finally, Respondent argues that the court should not look to the decisions of other states to find that Respondent owed a nondelegable duty to Appellants.

ARGUMENTS

I. RESPONDENT HAD A NONDELEGABLE DUTY OF REASONABLE CARE WHEN MAKING REPAIRS OR IMPROVEMENTS IN ITS COMMON AREA AND WAS LIABLE FOR THE NEGLIGENT ACTIONS OF ITS INDEPENDENT CONTRACTOR

The trial court held that Respondent was not liable for the negligence of Lambright because he was an independent contractor, and no already recognized exception applies to the general rule that a principal is not liable for the negligent acts of its independent contractor. (R. p. 5) (See Order Granting Summary Judgment, p. 2). However, the general rule that a principal is not liable for the torts of its independent contractor is not applicable as Respondent had a nondelegable duty of reasonable care when making repairs or improvements, including when maintaining trees in its common area, so that it is liable for the negligent actions of its independent contractor. Respondent contends that since there is not an already recognized exception for members of HOAs on HOA common property, that no exception exists.

- a. Respondent owed an absolute duty to Appellant Tommy Hobbs so that it remains liable for the negligence of its independent contractor just as if the independent contractor were an employee.

Respondent had a duty to maintain its common area pursuant to its covenants and restrictions. (R. p. 193) (Covenants and Restrictions, Article VI, Section 12, pg. 18). It was established in Durkin v. Hansen that the contractual duty to perform maintenance is an absolute duty. 313 S.C. 343, 437 S.E.2d 550 (Ct. App. 1993). Respondent argues that the contractual duty to perform maintenance is not an absolute duty, and instead, that the landlord-tenant exception as set forth in Durkin is based solely on the Residential Landlord Tenant Act. Respondent also argues that in the absence of similar statutes regarding homeowners association, a nondelegable duty should not exist. Respondent has a section of its brief entitled “Absent the RLTA, the independent contractor rule applies to landlord-tenant relationships, and maintenance is not a non-delegable duty.” (Respondent’s Brief, pg. 13). Respondent states that “[t]he nondelegable duties in the landlord-tenant context arise out of the RLTA. No similar statute has been adopted that would apply to an HOA under the facts of this case.” (Respondent’s Brief pg. 16). Respondent further states in a footnote that “[a]lthough this Court in Durkin cited both the RLTA and the language in the lease agreement as supporting finding a nondelegable duty, a mere agreement in a lease to repair the premises – even with notice – does not give rise to an action in tort for recovery of personal injuries.” (Respondent’s Brief, pg. 16, FN 7). In making these statements, Respondent ignores the plain language in Durkin. In Durkin, the Court specifically notes the existence of the rental agreement obligating the landlord to make repairs and maintenance before noting that the landlord also has

duties under the RLTA. 313 S.C. at 347-348, 437 S.E.2d. at 552. The Court then states that “[t]he performance of duties *assumed by Respondents by the rental agreement* and those imposed by the RLTA may, of course, be delegated to others. However, liability for injury or damage resulting from the performance of these duties may not be avoided merely by the employment of an independent contractor.” *Id* at 348, 553 (*Emphasis Added*). Further, the court cites as supporting authority 49 Am.Jur.2d Landlord and Tenant § 875 which states “[A] landlord who undertakes to make repairs or improvements for the benefit of his tenant, *whether he is obligated by law or by agreement with the tenant to do so*, or whether he does so gratuitously, cannot relieve himself from his liability for negligence in making such repairs or improvements by employing an independent contractor to do the work....” *Id* at 348, 553 (*Emphasis Added*). The Court also states “we find a material issue of fact exists as to whether Respondents breached their duty of care, *assumed in the agreement*, by undertaking the cleaning of the carpets in the condominium even though the work was actually performed by an independent contractor.” *Id* at 349, 553 (*Emphasis Added*). Finally, the Court states “Respondents cannot insulate themselves from *liability which has been assumed by agreement* and, additionally, imposed by statute, by the mere employment of an independent contractor. *Id* at 349, 554 (*Emphasis Added*). Despite Respondent’s assertion otherwise, the Durkin court makes it clear that the landlord-tenant exception is not based solely on the RLTA, and can be based on a contractual duty- the same contractual duty in the present case.

In addition to ignoring the plain language of Durkin, Respondent also ignores Conner v. Farmers and Merchants Bank, which was decided in 1963- long before the

RLTA was passed. In Conner, a landlord was held liable for injuries sustained by a tenant who fell on a negligently repaired brick floor. 243 S.C. 132, 132 S.E.2d 385 (1963).²

Instead of looking to the plain language of Durkin and Conner, Respondent cites Young v. Morrissey, which involved a fire due to defective electrical wiring. 285 S.C. 236, 329 S.E.2d 426 (1985). Respondent states that “[p]rior to the enactment of the RLTA, the South Carolina Supreme Court applied the independent contractor rule to shield a residential landlord from the negligence of an independent contractor in Young. (Respondent’s Brief pg. 13). While it is strictly true that the landlord in Young was not found liable for the negligent acts of an independent contractor, Young does not stand for this premise put forth by Respondent. Rather, the respondent landlord in Young was also the general contractor who built the subject premises. 285 S.C. at 238-239, 329 S.E.2d at 427. The alleged negligent act was performed by an electrical subcontractor during construction of the premises. The appellants in Young did not argue that the landlord owed a nondelegable duty to its tenant when making repairs by virtue of their relationship as landlord and tenant. Rather, the appellants in Young argued that installing electrical wiring was inherently dangerous work and “assert that the respondent general contractors remain liable for torts occurring during inherently dangerous work.” Id at 242, 429. As Respondent notes in footnote 6, Appellants have never argued that tree trimming is an inherently dangerous activity. (Respondent’s Brief, pg. 14). This holding has no bearing

² The fact pattern in Conner does not specify that the negligent repair work was performed by an independent contractor and does not mention a nondelegable duty. However, Conner is cited by the court in Simmons v. Tuomy Regional Medical Center, wherein the Court states “(upholding jury verdict against landlord for elderly tenant who fell on brick floor negligently repaired by contractor)”. 341 S.C. 32, 533 S.E.2d 312 (S.C. 2000), Footnote 5.

on the present case, as it deals with a contractor's liability for latent defects caused by the negligent work of its subcontractor when constructing the subject premises.

Respondent cites Creighton v. Coligny Plaza Limited Partnership for the premise that "a landlord in a commercial lease is not liable for the conduct of an independent contractor even when it assumes a duty to maintain the premises." (Respondent's Brief pg. 14). Respondent states that "despite the landlord's assumption of the duty to maintain the property, this Court went on to hold that the independent contractor rule applied to shield the landowner from liability for the lawn care service's negligence." (Respondent's Brief pg. 15). Creighton does not stand for the premise as stated by Respondent. In Creighton, the Court does state "[t]he trial court correctly ruled the Partnership was not liable for any negligence on the part of D&M in maintaining the palms and jasmine at the entrance steps to Rainbow's End because D&M was an independent contractor." 334 S.C. 96, 118, 512 S.E.2d 510, 521. The Court also includes footnote 5 at the end of this passage, wherein it states "[o]ne who hires an independent contractor to perform a nondelegable duty remains liable for the negligence of the independent contractor just as if the independent contractor were an employee. *Durkin*, 313 S.C. 343, 437 S.E.2d 550. This exception to the general rule of nonliability for the torts of an independent contractor was not presented to the trial court nor presented to this court on appeal. Thus, we do not reach the issue of whether the duty to maintain the entrance steps was a nondelegable duty for which the Partnership remained liable." *Id* at FN 5. The Court makes it clear that it is not making a finding regarding whether the landlord in Creighton had a nondelegable duty because the issue was not

raised. Therefore, Respondent's attempt to cite it for this premise ignores the Court's explicit language.

Respondent also states that Young stands for the premise that "prior to the enactment of the RLTA, a contractual obligation of a landlord to repair the premises did not give rise to a negligence action in tort[.]" (Respondent's Brief pg. 14). Further, Respondent states that "Here, at best Hobbs presented evidence that Fairway Oaks contractually agreed to 'maintain' the common areas. Absent more, Hobbs cannot seek recovery for his personal injuries. See Young, supra; Timmons, supra." (Respondent's Brief, pg. 14). Respondent again misinterprets the meaning of Young as it dealt with a latent defect of which the respondent landlord was not aware. Id at 239-240, 428. Instead, the applicable law is set out in Connor, wherein the Court states that:

"The delict charged here, however, is negligence on the part of the lessor in making repairs, and not a failure to make repairs as promised. A distinction is drawn in the decisions between the two situations, and it appears to be well established that where a lessor undertakes to repair or improve the leased premises and the work is done negligently, resulting in personal injury to the lessee, the lessor is liable for the damages so sustained. Negligence on the part of the lessor in making repairs or improvements is regarded as an act of misfeasance, subjecting him to tort liability for any resulting damages." 132 S.E.2d 385, 388 (S.C. 1963).

Further, the Court states that:

"[w]hile the question here was not involved, our cited cases of Timmons and Pendarvis recognize an exception to the general rule of nonliability of the landlord for personal injuries resulting from defective conditions in the leased premises in those instances where, as stated in Timmons, 'the lessor actually undertakes to make the needed repairs and negligently does so-where there is misfeasance as distinguished from nonfeasance.'" Id at 389.

The present case deals with negligence on the part of Respondent's contractor in making repairs, not the failure to make repairs. As made clear in Connor, a tenant may recover

for personal injuries that result from the negligence of a landlord or their agent when making repairs.

Respondent contends that the landlord-tenant exception does not apply to the negligent acts of others. Respondent states “[e]ven under the RLTA – which does not apply to the HOA – the nondelegable duty exception to the independent contractor rule only extends to defective conditions on the premises, not injuries caused by negligent actors on the premises.” (Respondent’s Brief pg. 18). This contention is incompatible with Respondent’s previous assertion that the landlord-tenant exception is based solely on the RLTA, as the plaintiff in Durkin was injured by the negligent acts of an independent contractor carpet cleaner. Durkin, 313 S.C. at 345, 437 S.E.2d at 551-552. This contention also contradicts the plain language of Durkin wherein the court states that “where the landlord undertakes to repair or improve the demised premises, whether he is under an obligation imposed by a covenant on his part to repair or improve or not, he is required to exercise reasonable care in making such repairs or improvements, and is *liable for injuries caused by his negligence or unskillfulness or that of his servants and employees in making them* or in leaving the premises in an unsafe condition. Id at 346-347, 552. (*Emphasis Added*).

Respondent also contends that it would not be liable even if it owed Appellant Tommy Hobbs a nondelegable duty because Appellant Tommy Hobbs hired Lambright in his capacity as president of Respondent. (Respondent’s Brief pg. 19, FN 9). Respondent bases this contention on a passage in Simmons, wherein the Court states “[t]he term ‘nondelegable duty’ is somewhat misleading. A person may delegate a *duty* to an independent contractor, but if the independent contractor breaches that duty by acting

negligently or improperly, the delegating person remains *liable* for that breach.” 341 S.C. 32, 42, 533 S.E.2d 312, 317 (S.C. 2000). Respondent does not include the next sentence in its brief which states “[t]he *party* which owes the nondelegable duty is vicariously liable for negligent acts of the independent contractor.” *Id.* (*Emphasis Added*). When read in context, it is clear that the word “person” was a generic term used by the Court- especially considering the fact that Simmons dealt with the nondelegable duty of an entity (hospital). The court could have interchangeably used the word “party” as they did in the following sentence or another similar generic term such as “entity”.

b. Based on its erroneous conclusion that the landlord-tenant exception is solely based on the RLTA, Respondent contends that the exceptions to the general rule of nonliability for the acts of independent contractors are only based on statutes or public obligations, and that therefore, any new exception should be statutorily based

Respondent states that “In modern times, South Carolina has only recognized exceptions to the independent contractor rule based on nondelegable duties in two situations: (1) the defendant attempts to delegate a statutory duty; or (2) the defendant provides a public service and attempts to delegate that distinctly public duty.” (Respondent’s Brief pg. 8). However, as previously discussed, this contention is not true with regard to the exception most analogous to the present case- the landlord-tenant exception. As set forth above, the landlord-tenant exception is not based on a statute. Further, the landlord-tenant exception does not involve the provision of a public service.³

Based on its conclusion that the landlord-tenant exception is based solely on the

³ If the landlord-tenant exception is found to involve a public service, then maintenance of a common area at an HOA would certainly also be the provision of a public service.

RLTA, respondent then reasons that the landlord-tenant exception was in effect a legislative creation. Respondent states “[i]n effect, Hobbs is petitioning this Court to create a new exception to the independent contractor rule even though the General Assembly has declined to do so.” (Respondent’s Brief pg. 12). The general rule that a principal is not liable for the acts of its independent contractor is a common law doctrine. See Conlin v. City Council of Charleston, 15 Rich. 201, 49 S.C.L. 201 (1868). This Court and our Supreme Court have recognized exceptions in other situations, and this Court is free to do so here. See Simmons v. Tuomy Regional Medical Center, 341 S.C. 32, 42, 533 S.E.2d 312, 317 (S.C. 2000).

c. A nondelegable duty exists in other similar circumstances such as the landlord-tenant context.

South Carolina recognizes an exception to the general independent contractor rule in the landlord-tenant context. The landlord-tenant exception is analogous to the present case wherein Appellant Tommy Hobbs was injured on Respondent’s common area. As described above, Respondent goes to great lengths to add unwarranted complexity and intricacy to the exception which is not present in the applicable case law and to try to differentiate it from the present case. Respondent attempts to analogize the relationship of an HOA member and an HOA to that of a property owner with his/her neighboring property owner. (Respondent’s Brief pgs. 16-17). Respectfully, the relationship of an HOA member to the HOA is much more analogous to that of a tenant on rented property. HOA’s such as Respondent are concomitant with planned developments wherein it is anticipated that property owner/members will utilize the common areas of the planned developments which are managed by the HOA. Similarly, rental properties such as

apartment complexes are often built with common features for use by tenants. Property owners in HOAs are frequently required to utilize common areas maintained by the HOA for things such as access to their property, just like tenants are often required to use common areas for access to the premises they rent. Unlike HOA common areas and rental property common areas, a neighbor's property is not intended for an adjoining property owner's use, and use of a neighbor's property is probably not necessary for access to the landowner's property.

d. Appellant Tommy Hobbs, was considered an invitee in Respondent's common area, and South Carolina has recognized a nondelegable duty in other similar cases where the injured party had the same or a lesser status than Appellant

South Carolina law is clear that a member of an HOA is considered an invitee when in the HOA common area. See Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc., 317 S.C. 200, 203, 452 S.E.2d 619, 620 (Ct. App. 1994). In other situations people with equal or lesser status as Appellants, such as customers in a store or tenants on a rented premises, are owed a nondelegable duty by the landowners. See S. Carolina Nat. Gas Co. v. Phillips, 289 F.2d 143, 148 (4th Cir. 1961); Durkin, 313 S.C. at 346-48, 437 S.E.2d at 552-553. As an invitee in the common area, Appellant Tommy Hobbs would have had at least the same status as a customer in a store or a tenant on a rented premises. Respondent doesn't dispute the fact that invitees are owed nondelegable duties in other situations. Instead, Respondent disputes that Hobbs is an invitee, stating, "Hobbs' contention that he was an invitee is unavailing." (Respondent's Brief pg. 19).⁴

⁴ Respondent states that "Hobbs cites the 'common areas' exception – which applies to landlords, not HOA's – to support his contention that he was an invitee and Fairway Oaks cannot rely upon the

Respondent does not provide any support for its contention that Hobbs was not an invitee in the common area, which is contrary to the holding in Landry.

e. Because this is a novel issue, the Court should look to the decisions of courts in other jurisdictions when deciding this case

As set out in Appellants' Initial Brief, Courts in other jurisdictions that have heard similar issues to that raised in the present case have held that HOAs owe nondelegable duties with regard to their common areas and common features. (Appellant's Initial Brief pg. 14-18). Respondent states that "Hobbs looks to foreign jurisdictions to find case law 'on similar issues,' presumably because he cannot find support for his position in South Carolina law. However, not only do intermediate appellate decisions from California and Florida lack any binding authority over this Court, but also the cases raised are not persuasive and do not set forth any compelling justification for changing the law of this State under the facts of this case." (Respondent's Brief pgs. 19-20). While Respondent's statement is true that the cases from other jurisdictions cited in Appellants' initial brief are not binding precedent, it ignores the fact that this Court and our Supreme Court often look to other jurisdictions when deciding novel issues. (For example, see Simmons). Further, it is notable that Respondent failed to provide any cases from other jurisdictions to support its position that it did not owe Appellants a nondelegable duty.⁵ Because the

independent contractor rule to avoid liability for his injuries." (Respondent's Brief pg. 19). The only place in Appellant's initial brief where the common area exception is discussed is in FN 5, wherein Appellants discuss the probable classification of a tenant in a rented premise's common areas as an invitee. As set forth in Landry, the status of an HOA member in the HOA's common areas is as an invitee. Appellants were unable to find definitive authority setting forth a tenant's status on a rented premise's common areas, and Footnote 5 was simply meant as Appellants' opinion of what a tenant's status would be in common areas. Because an HOA member is an invitee on HOA common areas, and invitee is the classification to which the highest duty is owed by a landowner, it does not matter for the present case whether a tenant is considered to be a licensee or an invitee in common areas.

⁵ Respondent does, however, cite to the cases of other states for the contention that a neighboring landowner is not liable for the negligence of an independent contractor tree trimmer in contradiction to its

present case presents a novel issue, this Court should look to the decisions of courts in other jurisdictions who have decided similar issues for guidance to find that Respondent owed Appellant Tommy Hobbs a nondelegable duty.

f. Respondent's Brief is replete with factual contentions that are not relevant to the issue before the court and which are, in some cases, subject to conflicting testimony

Respondent moved for and was granted summary judgment on the narrow ground that it was not liable for the negligent acts of Lambright because he was an independent contractor. (R. p. 5) (See Order Granting Summary Judgment, p. 2). The relevant facts to the question in front of this Court are not disputed by either party- Appellant Tommy Hobbs was injured by the negligence of Respondent's independent contractor on Respondent's common area, while the independent contractor was performing maintenance on behalf of Respondent which Respondent was obligated to perform. Despite the fact that it has no bearing on the present motion, Respondent notes throughout its brief that Appellant Tommy Hobbs was the president of Respondent at the time of the subject accident, that he hired Lambright and that Appellant Tommy Hobbs was allegedly negligent. Further, Respondent states some of the irrelevant facts with certitude not present in the record. For instance, Respondent provides a detailed account of subject accident, including where Appellant Tommy Hobbs was standing and what he was doing despite the fact that there is conflicting testimony from the eyewitnesses present. See (Respondent's Brief pgs. 3-4); (Appellant's Initial Brief pgs. 3-4).

dismissal of authority from other jurisdictions regarding nondelegable duties owed to HOA members. (Respondent's Brief pg. 17).

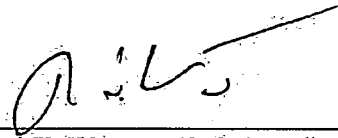
Respondent states, “[i]t is important to note what Hobbs is not contending and, even more importantly, why he is not making that contention. Hobbs is not asserting that Fairway Oaks negligently hired an independent contractor causing his injury. He cannot. Hobbs himself decided to hire his friend Lambright instead of a professional tree trimmer.” (Respondent’s Brief pg. 7). Respondent is correct: it is important to note what is at issue in the present case and what is not- Respondent often appears to be arguing against a negligent hiring cause of action that was never asserted, and to be arguing the relative negligence of the various actors.⁶

CONCLUSION

Appellants were injured by the actions of Respondent’s independent contractor. Respondent owed an absolute duty to Appellant Tommy Hobbs when performing maintenance such as tree cutting in its common area, and is liable for the negligent actions of its independent contractor. The trial court erred in granting summary judgment to Respondent on the ground that it was not liable for the negligent actions of Lambright because he was an independent contractor. Therefore, the trial court’s Order Granting Summary Judgment to Defendant Fairway Oaks Homeowners Association should be reversed and the case remanded.

⁶ It is well settled that negligence is a jury question. See Wilson v. Marshall, 260 S.C. 271 195 S.E.2d 610 (1973).

RESPECTFULLY SUBMITTED,



Raymond T. Wooten (S.C. Bar # 81483)

SMITH, JORDAN & LAVERY, P.A.

1810 East Main Street

Post Office Box 1207

Easley, South Carolina 29641-1207

(864) 855-1661 office

(864) 855-1685 fax

wooten@smithjordan.com

Attorney for Appellants

Easley, South Carolina
July 20, 2016



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

January 10, 2018

Mr. Raymond Talmage Wooten, Esquire
PO Box 1207
Easley SC 29641

Mr. Elliott Bishop Daniels, Esquire
Murphy & Grantland PA
PO Box 6648
Columbia SC 29260

Mr. John Robert Murphy, Esquire
PO Box 6648
Columbia SC 29260

Mr. Wesley Brian Sawyer, Esquire
PO Box 6648
Columbia SC 29260

Re: Charles Hobbs v. Fairway Oaks
Appellate Case No. 2015-002573

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

A handwritten signature in cursive script, appearing to read "J. A. Kiteley".

CLERK

cc: The Honorable Edward W. Miller

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Charles Thomas Hobbs and Mary Hobbs, Appellants,

v.

Fairway Oaks Homeowners Association, Respondent.

Appellate Case No. 2015-002573

Appeal From Pickens County
Edward W. Miller, Circuit Court Judge

Unpublished Opinion No. 2018-UP-011
Heard October 4, 2017 – Filed January 10, 2018

AFFIRMED

Raymond Talmage Wooten, of Smith, Jordan and
Lavery, PA, of Easley, for Appellants.

John Robert Murphy, Wesley Brian Sawyer, and Elliott
Bishop Daniels, all of Murphy & Grantland, PA, of
Columbia, for Respondent.

PER CURIAM: Charles Thomas Hobbs and Mary Hobbs (collectively, Hobbs) appeal a circuit court order granting summary judgment to Fairway Oaks Homeowners Association (Fairway Oaks) for Hobbs's claim that Fairway Oaks was liable for injuries Charles Hobbs sustained when an independent contractor

negligently removed a damaged tree limb in the neighborhood common area. On appeal, Hobbs argues the circuit court erred by holding Fairway Oaks did not owe a nondelegable duty when performing maintenance to its common area.

We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *Gary v. Askew*, 417 S.C. 232, 239-40, 789 S.E.2d 94, 98-99 (Ct. App. 2016) ("An appellate court reviews a grant of summary judgment by applying the same standard as the circuit court under Rule 56(c), SCRCR."); *Cherry v. Myers Timber Co.*, 404 S.C. 596, 600, 745 S.E.2d 405, 407 (Ct. App. 2013) ("In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party."); *Easterling v. Burger King Corp.*, 416 S.C. 437, 445, 786 S.E.2d 443, 447 (Ct. App. 2016) ("In a negligence case, where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment." (quoting *Bass v. Gopal, Inc.*, 395 S.C. 129, 134, 716 S.E.2d 910, 912 (2011))); *Rock Hill Tel. Co. v. Globe Commc'ns, Inc.*, 363 S.C. 385, 390, 611 S.E.2d 235, 238 (2005) ("The general rule is that an employer is not vicariously liable for the negligent acts of an independent contractor."); *Gary*, 417 S.C. at 249, 789 S.E.2d at 103 ("While it is difficult to define the exact circumstances under which a nondelegable duty will be found, a review of case law reveals that our courts' decisions regarding whether to apply the nondelegable duty doctrine are primarily grounded in public policy considerations."); *Rock Hill Tel. Co.*, 363 S.C. at 391, 611 S.E.2d at 238 (reviewing South Carolina's nondelegable duty doctrine and refusing to expand it to include public utilities).

AFFIRMED.

LOCKEMY, C.J., and HUFF and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No.: 2014-CP-39-00613

RECEIVED
JAN 25 2018
SC Court of Appeals

Charles Thomas Hobbs and Mary
Hobbs,

Appellants,

v.

Fairway Oaks Homeowners
Association,

Respondent.

APPELLANTS' PETITION FOR REHEARING

Raymond T. Wooten (S.C. Bar # 81483)
SMITH, JORDAN & LAVERY, PA
1810 East Main Street
Post Office Box 1207
Easley, South Carolina 29641-1207
(864) 855-1661 office
(864) 855-1685 fax
Wooten@SmithJordan.com
Attorney for Appellants

Appellants, pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules,
hereby petition for a rehearing or rehearing *en banc* of the decision in this appeal based on the
following grounds:

1. The Court misapprehended or overlooked the fact that Respondent owed an absolute duty to Appellant Tommy Hobbs so that it remains liable for the negligence of its independent contractor just as if the independent contractor were an employee.

“The general rule is that an employer is not vicariously liable for the negligent acts of an independent contractor.” Rock Hill Telephone Co. v. Globe Communications, Inc., 363 S.C. 385, 390, 611 S.E.2d 235, 238 (2005) (internal citations omitted). However, “[a]n exception to the general rule is that ‘[a] person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an employee.’” Id. (internal citations omitted). Here, Respondent’s Covenants and Restrictions created an affirmative duty for Respondent to maintain its common area. (R. p. 193) (Covenants and Restrictions, Article VI, Section 12, pg. 18). In Durkin v. Hansen, the court found that a landlord’s duty to maintain a premises pursuant to a rental agreement was an absolute duty owed to another person so that the landlord would be liable for the negligence of its independent contractor. 313 S.C. 343, 437 S.E.2d 550 (Ct. App. 1993). Respondent owed the same absolute duty to Appellant Tommy Hobbs to maintain the common area as the landlord in Durkin owed to its tenant, and cannot escape liability by delegating the duty to an independent contractor.

2. The Court misapprehended or overlooked the fact that a nondelegable duty exists in other similar circumstances such as the landlord-tenant context.

There are a number of recognized exceptions to the general rule that a principal is not liable for the negligent acts of its independent contractor. See Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 42-43, 533 S.E.2d 312, 317-318 (2000). One such exception

occurs in the landlord tenant context wherein “[a] landlord who undertakes repair of his property by use of a contractor has a nondelegable duty to see that the repair is done properly, and remains vicariously liable for injuries caused by improper repairs.” Id at 42-43, 317-318. This exception was examined in Durkin v. Hansen where the court found that a landlord was liable for the negligent acts of its independent contractor carpet cleaner. 313 S.C. 343, 437 S.E.2d 550 (Ct. App. 1993). In Durkin, the landlord was obligated to maintain the leased premises by virtue of its lease agreement with the tenant.¹ Id at 347-348, 553. The court found that the landlord owed a nondelegable duty to its tenant when performing maintenance on the leased premises and could not escape liability for injuries caused by the negligence of an independent contractor. Id at 348, 553. In the present case, Respondent was obligated to maintain its common area by its Covenants and Restrictions. (R. p. 193) (Covenants and Restrictions, Article VI, Section 12, pg. 18). Like the landlord’s duty to maintain the premises in Durkin, Respondent here had a duty to maintain its common areas. Respondent owed the same absolute duty to Appellant Tommy Hobbs to maintain the common area as the landlord in Durkin owed to its tenant, and cannot escape liability by delegating the duty to an independent contractor.

3. The Court misapprehended or overlooked the fact that Appellant Tommy Hobbs, as a member of Fairway Oaks, was considered an invitee in Fairway Oaks’ common area, and South Carolina has recognized a nondelegable duty in other similar cases where the injured party was an invitee.

Appellant Tommy Hobbs was a member of Respondent and was injured on Respondent’s common area. A member of a homeowners association, such as Appellant Tommy Hobbs, is considered an invitee on the common area owned by the homeowners association. Landry v.

¹ In Durkin, the Court states that in addition to the duties set forth in the rental agreement, Defendants also had duties imposed by the South Carolina Residential Landlord Tenant Act. 313 S.C. at 348-349, 437 S.E.2d at 553.

Hilton Head Plantation Prop. Owners Ass'n. Inc., 317 S.C. 200, 204, 452 S.E.2d 619, 621 (Ct. App. 1994). As an invitee, Appellant Tommy Hobbs was owed the utmost duty of care by Respondent. See Sims v. Giles, 343 S.C. 708, 715, 541 S.E.2d 857, 861 (Ct. App. 2001). In other situations, a landowner cannot escape liability for an injury to an invitee caused by the negligence of its independent contractor. See S. Carolina Nat. Gas Co. v. Phillips, 289 F.2d 143, 148 (4th Cir. 1961)(Discussing the nondelegable duty owed by a storekeeper to its invitee customers when performing maintenance and repairs). Like a customer in a store, Appellant Tommy Hobbs was an invitee when on Respondent's common area and Respondent cannot escape liability for the negligence of its independent contractor.

4. **The Court misapprehended or overlooked the fact that Courts in other states who have ruled on similar issues have determined that homeowners associations have nondelegable duties to their members in circumstances similar to the present case.**

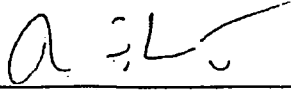
The issue of whether a homeowners association owes a nondelegable duty to a member in its common areas is a novel question in South Carolina. In Simmons v. Tuomey Regional Medical Center, the court was similarly presented with the novel issue of "whether a hospital owes a common law nondelegable duty to render competent service to its emergency room patients, such that it may not avoid liability for the negligent acts of emergency room physicians hired as independent contractors under a contract between the hospital and a separate corporation." 341 S.C. 32, 35, 533 S.E.2d 312, 314 (2000). In answering this question, the court looked to other jurisdictions who had previously addressed the issue. Id at 44-48, 318-321 (Discussion of decisions in other jurisdictions). Other states have addressed similar issues to the one in the present case have found that a nondelegable duty is owed. See Affan v. Portofino Cove Homeowners Association, 189 Cal. App. 4th 930, 945 (2010 Cal. App. 4th)(Finding that a

homeowners association had a nondelegable duty to property owners to maintain common area plumbing, and that the homeowners association could be liable for damage caused by an independent contractors' negligent actions in repairing the plumbing); see also Vasquez v. Lago Grand Homeowners, 900 So.2d 587 (Finding that the defendant homeowners association had a duty to keep the premises secure, was liable for its failure to do so as a result of its contractual obligations, and noting that the defendant homeowners association could not escape liability even though its independent contractor had performed the negligent acts); see also Moon v. Homeowners' Ass'n of Sibley Forest, Inc., 202 Ga. App. 821, 415 S.E.2d 654 (1992)(Finding that, where a guest was injured at a common area pool, the homeowners association could be liable for the negligence of the lifeguard despite the fact that the company who was hired to provide the lifeguard was an independent contractor of the homeowners association); see also Gazo v. City of Stamford, 255 Conn. 245, 765 A.2d 505 (2001)(Where the court stated that the occupier of a premises owes a nondelegable duty to exercise ordinary care for the safety of invitees).

CONCLUSION

Appellants therefore respectfully request a rehearing or rehearing *en banc* in this case on the grounds raised above.

RESPECTFULLY SUBMITTED,



Raymond T. Wooten (S.C. Bar # 81483)

SMITH, JORDAN & LAVERY, PA

1810 East Main Street

Post Office Box 1207

Easley, South Carolina 29641-1207

(864) 855-1661 office

(864) 855-1685 fax

Wooten@SmithJordan.com

Attorney for Appellants

Easley, South Carolina
January 23, 2018

The South Carolina Court of Appeals

Charles Thomas Hobbs and Mary Hobbs, Appellants,

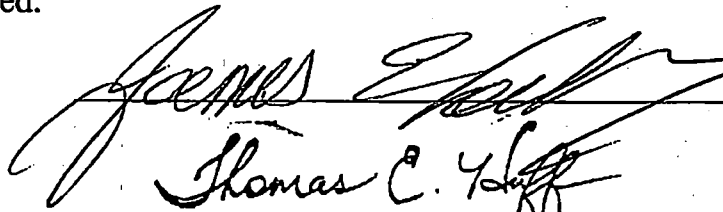
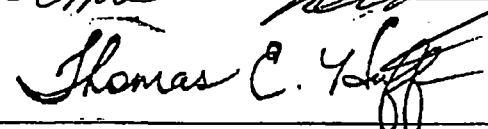
v.

Fairway Oaks Homeowners Association, Respondent.

Appellate Case No. 2015-002573

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

Raymond Talmage Wooten, Esquire

Elliott Bishop Daniels, Esquire

John Robert Murphy, Esquire

Wesley Brian Sawyer, Esquire

The Honorable Edward W. Miller

FILED

February 22, 2018